Supreme Court, U.S.
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In The

Supreme Court of the United States

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PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
BILL LOCKYER, ATTORNEY GENERAL,

Petitioner,

v.

DYNEGY, INC. et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California Attorney General's state law enforcement proceedings were improperly removed from state court and adjudicated in federal district court, because *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), compel the conclusion that neither original nor removal jurisdiction may be found in section 825p of the Federal Power Act, 16 U.S.C. § 825p, and as the United States Court of Appeals for the Ninth Circuit acknowledged, no other statute authorized the exercise of federal jurisdiction.

2. Even if the district court had jurisdiction, whether the sovereign immunity of the States, as preserved by the Eleventh Amendment to the Constitution, nevertheless barred involuntary removal of these state law enforcement proceedings.

LIST OF PARTIES

Bill Lockyer, Attorney General of the State of California, on behalf of the People of the State of California, was the plaintiff-appellant below in all three proceedings in which he now petitions this Court.

The following companies were defendants-appellees below in Case Nos. 02-16610, 03-15588, and are respondents herein: Dynegy, Inc.; Dynegy Power Marketing, Inc.; NRG Energy, Inc.; Xcel Energy, Inc.; West Coast Power, L.L.C.; Cabrillo Power I, L.L.C.; Cabrillo Power II, L.L.C.; Long Beach Generation, L.L.C.; and Does 1-100.

The following companies were defendants-appellees below in Case Nos. 02-16625, 03-15588, and are respondents herein: Reliant Energy, Inc.; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources, Inc.; Reliant Energy Coolwater, L.L.C.; Reliant Energy Ellwood, L.L.C.; Reliant Energy Etiwanda, L.L.C.; Reliant Energy Mandalay, L.L.C.; Reliant Energy Ormond Beach, L.L.C.; and Does 1-100.

The following companies were defendants-appellees below in Case Nos. 02-16629, 03-15588, and are respondents herein: Mirant Corporation; Mirant California, L.L.C.; Mirant Delta, L.L.C.; Mirant Potrero, L.L.C.; Mirant Americas Energy Marketing, L.P.; Mirant California Investments, Inc.; Mirant Americas, Inc.; Southern Energy Golden States Holdings, Inc.; and Does 1-100.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
1. State Law Creates the Cause of Action	5
2. Proceedings in the District Court	5
3. The Court of Appeals' Opinion	6
REASONS FOR GRANTING THE WRIT	8
I. The Decision Below Conflicts With Decisions of this Court and Other Circuits	9
A. This Court Strictly Interprets Removal Jurisdiction	9
B. The Conflict with *Merrell Dow* and *Pan American* Is Explicit and Unavoidable	13
1. The Opinion Explicitly Conflicts with *Pan American*	13
2. The Opinion Directly Conflicts with *Merrell Dow*	15
B. The Conflicts Raise Recurring Issues of Practical Importance	17
1. The Opinion Puts the Federal Courts on a Collision Course with State Law Enforcement	17

TABLE OF CONTENTS – Continued

Page

2. The Opinion Upsets the Balance of State and Federal Judicial Authority ... 18

3. The Opinion Is Detrimental to the Credibility and Management of the Federal Judicial System ... 19

II. The Sovereign Immunity of the States to Avoid Removal of State Claims Is One of National Importance and First Impression ... 21

A. The Circuits Are Divided ... 21

B. The Opinion Disregards Controlling Supreme Court Precedent ... 23

C. If Federal Removal Jurisdiction Is Expanded, the Boundaries Of State Sovereign Immunity Will Be Confronted on a Regular Basis ... 25

CONCLUSION ... 27

TABLE OF AUTHORITIES

Page

CASES

Alch v. Superior Court, 122 Cal.App.4th 339 (2004) 12

Ames v. Kansas, 111 U.S. 449 (1884) 23

AmSouth Bank v. Dale, 386 F.3d 763 (C.A.6 2004) 16

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 14

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 25

Beneficial National Bank v. Anderson, 539 U.S. 1 (2003) 10, 11, 16, 17-18

Bracey v. Board of Education of City of Bridgeport, 368 F.3d 108 (C.A.2 2004) 17

Bryan v. BellSouth Communications, Inc., 377 F.3d 424 (C.A.4 2004), *petition for cert. filed*, 73 U.S.L.W. 3338 (U.S. Nov. 22, 2004) (No. 04-705) 20

California ex rel. Lockyer v. Federal Energy Regulatory Commission, 383 F.3d 1006 (C.A.9 2004) 3

California v. Dynegy, Inc., 375 F.3d 831, *as amended on denial of rehearing*, 387 F.3d 966 (C.A.9 2004) 1

California v. Mirant Corp., 266 F.Supp.2d 1046 (N.D. Cal. 2003) 1

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 9, 10, 19

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163 (1999) 12

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) 10, 12

TABLE OF AUTHORITIES – Continued

Page

City of Rome, N.Y. v. Verizon Communications, Inc., 362 F.3d 168 (C.A.2 2004) 17

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 23

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 26

Dixon v. Coburg Dairy, Inc., 369 F.3d 811 (C.A.4 1994) 16-17

Donabedian v. Mercury Insurance Co., 116 Cal.App. 4th 968 (2004) 12

Dunlap v. G&L Holding Group, Inc., 381 F.3d 1285 (C.A.11 2004) 20

Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279 (1973) 25

Ernzen v. Ernzen, 1997 WL 7276 (C.A.10 1997) 16

Exxon Corp. v. Hunt, 683 F.2d 69 (C.A.3 1982) 15

Federal Maritime Comm'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002) 24

Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) ..... *passim*

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 25-26

Gully v. First National Bank in Meridian, 299 U.S. 109 (1936) 10, 12, 13

Hans v. Louisiana, 134 U.S. 1 (1890) 23, 24

Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826 (2002) 21

TABLE OF AUTHORITIES – Continued

Page

Jairath v. Dyer, 154 F.3d 1280 (C.A.11 1998) 17

King v. Marriott International, Inc. 337 F.3d 421 (C.A.4 2003) 20

Krumme v. Mercury Insurance Co., 123 Cal.App.4th 924 (2004) 12

Lapides v. Bd. of Regents, 535 U.S. 613 (2002) 26

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) ..... *passim*

Ochs v. PacifiCare of California, 115 Cal.App.4th 782 (2004) 12

Oklahoma v. Magnolia Marine Transport Co., 359 F.3d 1237 (C.A.10 2004) 23

Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1960) ..... *passim*

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 23

Powers v. South Central United Food & Commercial Workers Unions & Employers Health & Welfare Trust, 719 F.2d 760 (C.A.5 1983) 15

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139 (1993) 25

Regents of the Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559 (C.A.Fed. 1997) 23

Roddy v. Grand Trunk Western Railroad Inc., ___ F.3d ___, 2005 WL 77156 (C.A.6 2005) 20

Rogers v. Platt, 814 F.2d 683 (C.A.D.C. 1987) 17

Seinfeld v. Austen, 39 F.3d 761 (C.A.7 1994) 16

TABLE OF AUTHORITIES – Continued

Page

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 24

Smith v. Industrial Valley Title Ins. Co., 957 F.2d 90 (C.A.3 1992) 16

Sparta Surgical Corp. v. National Association of Securities Dealers, Inc. 159 F.3d 1209 (C.A.9 1998) . 7, 13, 14

State of Arkansas v. Kansas & Texas Coal Co., 183 U.S. 185 (1901) 18

State of California ex rel. Harris v. PriceWaterhouseCoopers LLP, ___ Cal.App.4th ___; 2005 WL 119893 (2005) 12

State of Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894) 10

Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002) 9

Taylor v. Anderson, 234 U.S. 74 (1914) 9

Templeton Board of Sewer Commissioners v. American Tissue Mills of Massachusetts, Inc., 352 F.3d 33 (C.A.1 2003) 17

Thomas v. FAG Bearings Corp., 50 F.3d 502 (C.A.8 1995) 22, 23

Willy v. Coastal Corp., 855 F.2d 1160 (C.A.5 1988) 16

CONSTITUTION

U.S. CONST. amend. XI ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

15 U.S.C.
§ 717u 3, 13, 14
§ 78aa 7, 14

16 U.S.C.
§ 824d 5
§ 825p ..... *passim*

28 U.S.C.
§ 1254(1) 1
§ 1331 ..... *passim*
§ 1441 ..... *passim*

29 U.S.C. § 1140 20

45 U.S.C. §§ 151-163, 181-188 20

California Business & Professions Code §§ 17200 et seq. 1, 5, 11, 12

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TABLE OF AUTHORITIES – Continued

Page

Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between State and Federal Courts*, 104 Colum. L. Rev. 1211 (2004)..... 18, 20

Brianna J. Fuller, *Developments in the Law: Federal Jurisdiction and Forum Selection Development Symposium, Part III: Federal Question Jurisdiction*, 37 Loy. L.A. L. Rev. 1443 (2004)..... 21

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at *California v. Dynegy, Inc.*, 375 F.3d 831, *as amended on denial of rehearing*, 387 F.3d 966 (C.A.9 2004), and appears in the Petitioner's Appendix ("Pet. App."). Pet. App. 1a-43a, 104a-108a. The order of the United States District Court for the Northern District of California dated August 6, 2002, is unpublished, Pet. App. 44a-60a; and its order of March 25, 2003, is published at *California v. Mirant Corp.*, 266 F.Supp.2d 1046 (N.D. Cal. 2003), Pet. App. 61a-95a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion and judgment on July 6, 2004. On July 27, 2004, the California Attorney General filed a timely motion for rehearing and rehearing en banc. The Court of Appeals denied that motion on October 29, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

California Business & Professions Code §§ 17200 et seq. ("Section 17200") provides in relevant part: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice . . . ." Other provisions are set forth fully in the Appendix. Pet. App. 110a-131a.

28 U.S.C. § 1441, provides, in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship of the parties. . . .

28 U.S.C. § 1331, provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

16 U.S.C. § 825p, provides:

> The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may

> be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

15 U.S.C. § 717u is reproduced at Pet. App. 109a.

The Eleventh Amendment, U.S. CONST. amend. XI, provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

The underlying proceedings are civil law enforcement actions that address the fraudulent sale of both electric power and the capacity needed to generate that power. The pertinent sales took place in California's wholesale power market in the period leading up to and during the California Energy Crisis of 2000-2001. During the crisis, "energy prices skyrocketed and rolling brown-outs threatened California's businesses and citizens. Despite the promise of truly competitive market-based rates, the California energy market was subjected to artificial manipulation on a massive scale. With FERC abdicating its regulatory responsibility, California consumers were subjected to a variety of market machinations . . . ." *California ex rel.*

Lockyer v. Federal Energy Regulatory Commission, 383 F.3d 1006, 1014-1015 (C.A.9 2004).

The facts are straightforward. The California Independent System Operator ("ISO") is a California public benefit corporation that manages California's electrical transmission grid. The ISO routinely purchases both electric power and power generation capacity to be held in reserve. Because electricity cannot be stored economically, the ISO needs generation capacity that it can dispatch on short notice to generate and deliver power. The ISO dispatches power from this capacity as needed to maintain the safety and reliability of the state's electricity transmission system. These dispatches keep the state's power grid in balance in response to routine fluctuations in supply and demand, and emergencies like power plant or transmission line failures.

Respondents (the "Generators") defrauded the ISO in two different ways, in each of these transactions, dating back to 1998. First, without any intention of performing on their promise, the Generators agreed to hold power generation capacity in reserve for the ISO to dispatch as needed. Second, when the price of electricity spiked, they generated power from this capacity and dumped that power onto the grid. The Generators then collected payment twice: once for capacity they did not hold in reserve as promised; and again for power that the ISO did not dispatch. Tens of millions of dollars in these fraudulent charges were passed through to the State's utilities, and through them, to California's ratepayers. The Generators not only defrauded the people of the State, they also jeopardized the people's safety and security by compromising the integrity of the ISO's safety net of reserves.

1. State Law Creates the Cause of Action.

Petitioner (the "California Attorney General"), in his capacity as the State's chief law officer, filed the three underlying actions in California Superior Court. Each complaint alleged a single cause of action for violation of California's Unfair Competition Law, Business & Professions Code § 17200 et seq. ("Section 17200"). Pet. App. 132a-157a, 158a-185a, 186a-211a. The complaints alleged in the alternative that the conduct described above violated Section 17200 because it was "unfair" (the Generators took payment for services either not provided or not requested), and "fraudulent" (the Generators falsely promised to supply services), and "unlawful" (the Generators violated the ISO tariff[1] and converted power generation capacity that belonged to the ISO). The complaints did not assert any right to relief under federal law.

2. Proceedings in the District Court.

The Generators removed the cases to federal court pursuant to 28 U.S.C. § 1441, asserting federal question jurisdiction under section 825p of the Federal Power Act, 16 U.S.C. § 825p ("Section 825p") and 28 U.S.C. § 1331. Pet. App. 212a-217a, 218a-224a, 224a-230a. The California Attorney General moved to remand, arguing that the district court lacked grounds for removal jurisdiction and alternatively, that California's sovereign immunity, as

[1] The ISO tariff was filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act, 16 U.S.C. § 824d (the "FPA"). The Generators are not parties to the ISO tariff, but they are parties to agreements governed by California law, in which they agreed to comply with the terms of the ISO tariff. *See, e.g.*, Pet. App. 135a-137a, 142a.

preserved by the Eleventh Amendment, barred involuntary removal. The Generators moved to dismiss, arguing that federal preemption and the filed rate doctrine provided absolute defenses.

On August 6, 2002, the district court denied the motions to remand. On August 13, 2002, the California Attorney General filed notices of appeal. While these interlocutory appeals were being briefed to the Court of Appeals, on March 25, 2003 the district court issued an order granting the pending motions to dismiss, with prejudice, and directing entry of judgment.

On March 28, 2003, the California Attorney General filed a notice of appeal from the March 25 order. The district court entered final judgment on April 1, 2003.

3. The Court of Appeals' Opinion.

On July 6, 2004, the Court of Appeals affirmed the judgment in a published opinion. The court held that Section 825p of the FPA is an independent basis for federal jurisdiction that takes these proceedings outside the established rules governing original federal question jurisdiction under 28 U.S.C. § 1331. Pet. App. 18a-22a & n.10. It held that the jurisdiction afforded by Section 825p abrogates the "well-pleaded complaint rule" and permits a district court to assert removal jurisdiction over a state law claim for relief. *Id.*

In so holding, the Court of Appeals acknowledged the controlling significance of *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). The court noted that because there is no federal

claim for relief that the California Attorney General could have alleged under the Federal Power Act ("FPA"). *Merrell Dow* precludes federal jurisdiction under 28 U.S.C. § 1331. Pet. App. 18a-19a. The court also recognized that under *Pan American*, the district court could not assert federal question jurisdiction on the basis of Section 825p, because the cause of action did not arise under the FPA. *Id.* at 19a-22a & n.10.

The Court of Appeals refused, however, to follow *Merrell Dow*, concluding that its decision in *Sparta Surgical Corp. v. National Association of Securities Dealers, Inc.*, 159 F.3d 1209 (C.A.9 1998), governed instead.[2] Pet. App. 18a-22a & n.10. The opinion states that "in the case before us, the exclusive jurisdiction provision [Section 825p of the FPA] seemingly falls within our court's *Sparta* exception to *Merrell Dow*. . . . " *Id.* at 18a-19a. The court also explicitly departed from *Pan American*, stating: "the *Pan American* Court does state that the Natural Gas Act's exclusive jurisdiction provision is not a 'generator of jurisdiction'. . . . We feel bound, however, by *Sparta's* subsequent interpretation of language substantially identical to that contained within the FPA . . . ". *Id.* at 21a-22a & n.10.

The Court of Appeals further held that state sovereign immunity did not bar involuntary removal of the State's case. In so ruling, the court relied on a literal interpretation of the Eleventh Amendment, holding that "removal does not constitute the commencement or prosecution of a

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[2] In *Sparta*, the Ninth Circuit considered an exclusive jurisdiction provision in the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. Pet. App. 15a-17a.

suit." Pet. App. 27a. The court rejected the argument that removal, like a suit against a State, violates a State's sovereign right to choose the forum in which it prosecutes civil enforcement actions. The court also stated that California waived its sovereign immunity when it "voluntarily appeared in state court to press its claims against the companies, who predictably sought removal to what they perceived to be a more favorable forum for the adjudication of claims involving federal law . . . . " *Id.* at 32a. The court then affirmed dismissal on the merits based on federal preemption and the filed rate doctrine.

On October 29, 2004, the Court of Appeals denied rehearing and rehearing en banc. Pet. App. 104a-108a.

REASONS FOR GRANTING THE WRIT

This petition presents important and recurring questions about the scope of federal removal jurisdiction, the intersection of removal jurisdiction and state law enforcement, and state sovereign immunity. The Ninth Circuit Court of Appeals reached out to find a new basis for the exercise of removal jurisdiction. In so doing, it refused to apply both *Pan American* and *Merrell Dow,* and disregarded well-established principles of statutory construction, comity, federalism and state sovereign immunity that limit the exercise of removal jurisdiction, particularly when a state is seeking to enforce its own laws in its own courts.

I. The Decision Below Conflicts With Decisions of this Court and Other Circuits.

A. This Court Strictly Interprets Removal Jurisdiction.

The Ninth Circuit departed from a well-established analytical framework. As this Court has often said, the governing jurisdictional structure has been constant for more than a century. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 391-392 (1987). Only state court actions that could have been brought originally in federal court may be removed to federal court. 28 U.S.C. § 1441(a); *see, e.g., Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33 (2002). Where, as here, there is no diversity of citizenship, the propriety of removal turns on whether the case falls within the original "federal question" jurisdiction of the district courts. *See* 28 U.S.C. § 1441(b); 28 U.S.C. § 1331; *Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 8 (1983).

The "well-pleaded complaint" rule determines the presence or absence of federal question jurisdiction for purposes of both original and removal jurisdiction. *Franchise Tax Board*, 463 U.S. at 10 n.9. It provides that: "'[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration. . . .'" *Id.* at 9-10 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). The well-pleaded complaint rule has two components, both of which must be satisfied to assert federal question jurisdiction. First, the federal question must appear on the face of the complaint: a federal question cannot be injected into the

case by way of a federal defense, even a federal preemption defense. *Franchise Tax Board*, 463 U.S. at 10; *Gully v. First National Bank in Meridian*, 299 U.S. 109, 116 (1936). The plaintiff is therefore "master of the complaint": he may avoid federal jurisdiction by eschewing federal law and pleading only state claims, and federal jurisdiction cannot be exercised on grounds attributed to, but not actually alleged in the complaint. *See Caterpillar*, 482 U.S. at 398-399; *State of Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 460 (1894). Second, the well-pleaded complaint rule requires that the federal question alleged be essential to establish the claim. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 810-811 (1988).

Under the well-pleaded complaint rule, absent diversity, removal jurisdiction generally is lacking unless the complaint affirmatively alleges a right to relief under federal law. *See Beneficial National Bank v. Anderson*, 539 U.S. 1, 6 (2003). Where, as here, a complaint alleges only a state cause of action but refers to federal law, the well-pleaded complaint rule requires that the question of federal law appear on the face of the complaint and be essential to establish the state cause of action. *See Franchise Tax Board*, 463 U.S. at 10-11. It is not enough that the complaint mentions federal law. "[O]riginal federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims. . . . " *Id.* at 13. Moreover, if Congress has not intended that there be a federal right of action to vindicate violations of that federal law, the question of federal law is insufficiently

substantial to support the exercise of federal jurisdiction.[3] *Merrell Dow*, 478 U.S. at 817.

To affirm the exercise of federal jurisdiction in these cases, the Court of Appeals was forced to abandon this paradigm. First, the complaints did not affirmatively state a federal claim, nor could they have, because the California Attorney General has no right of action under the FPA, as the defendants and the courts below acknowledged. *See* Pet. App. 18a-19a. Second, a substantial disputed question of federal law was not a *necessary* element of the well-pleaded state claim. There is no doubt that the complaints referred to federal law – *i.e.*, violation of the ISO tariff – in alleging one of two alternate theories of "unlawful" conduct under Section 17200.[4] But the "unlawful" allegations were not essential to plead the cause of action, which was adequately stated in the alternative as "unfair" and "fraudulent."

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[3] This Court has recognized two narrow exceptions to the well-pleaded complaint rule, neither of which applies here. The first is a statute that calls for removal of state claims. *Beneficial*, 539 U.S. at 6. The second is "complete preemption." *Id.* at 7-8. A state-law cause of action is "completely preempted" when a federal statutory scheme has such extraordinary preemptive force that it manifests Congressional intent to displace entirely any state cause of action within the scope of its exclusive enforcement provision. *See Franchise Tax Board*, 463 U.S. at 23-24. In such a case, the court re-characterizes the mislabeled state claim as federal for purposes of removal. *See id.* The parties briefed complete preemption below, but the Court of Appeals did not address it. Clearly, however, the FPA does not completely preempt these state civil enforcement proceedings because there is no substitute federal claim available to the California Attorney General under the FPA. *See Beneficial*, 539 U.S. at 8.

[4] The ISO tariff has the force of federal law. *See Pan American*, 366 U.S. at 605.

Under California law, either "unfair" or "fraudulent" conduct adequately states a Section 17200 claim, even if the conduct is not "unlawful."[5] *State of California ex rel. Harris v. PriceWaterhouseCoopers LLP*, ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___, 2005 WL 119893 at *44 (2005). Under California law, violation of the ISO tariff was not an allegation essential to plead a Section 17200 claim. *See id.* Accordingly, under this Court's century-old framework, the Section 17200 claims did not "arise under" federal law, and the district court lacked jurisdiction under 28 U.S.C. §§ 1331 and 1441. *See Christianson*, 486 U.S. at 812;

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[5] In a footnote, the Court of Appeals casually dismissed the well-established alternative pleading feature of Section 17200, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999). Pet. App. 17a n.6. *Cel-Tech*, however, is inapposite. The relevant inquiry under the well-pleaded complaint rule is a *pleading* question: Could the California Attorney General adequately allege a Section 17200 claim without reference to the ISO tariff? *Cel-Tech* does not address this question because it did not address pleading requirements at all. It addressed a judgment following trial, and the portion of the opinion to which the Court of Appeals referred specifically addressed whether a claim that conduct was "unfair" was proven on the merits. Even if, on the merits, the tariff would be a *defense* to a claim of unfairness or fraudulence, this would not mean, as a pleading matter, that a claim would not adequately be stated without reference to the tariff. The irony here is that in order to assert federal jurisdiction, the Court of Appeals decided that the allegations of "unfair" and "fraudulent" conduct in the underlying complaints were inadequate under California law based on an issue of California law that the courts of California have considered but not yet resolved. *See generally Alch v. Superior Court*, 122 Cal.App.4th 339, 402-403, 19 Cal.Rptr.3d 29, 78-79 (2004); *Krumme v. Mercury Insurance Co.*, 123 Cal.App.4th 924, 939, 20 Cal.Rptr.3d 485, 496 (2004); *Donabedian v. Mercury Insurance Co.*, 116 Cal.App.4th 968, 994 & n.5, 11 Cal.Rptr.3d 45, 64 & n.5 (2004); *Ochs v. PacifiCare of California*, 115 Cal.App.4th 782, 793-794, 9 Cal.Rptr.3d 734, 741 (2004). This kind of conflict is precisely what the well-pleaded complaint rule is designed to avoid. *See Gully*, 299 U.S. at 116-117.

Franchise Tax Board, 463 U.S. at 14; *Gully*, 299 U.S. at 116-117. Some other basis for removal jurisdiction was necessary to affirm, which the Court of Appeals found in *Sparta* and Section 825p.

B. The Conflict with *Merrell Dow* and *Pan American* Is Explicit and Unavoidable.

The Court of Appeals explicitly departed from *Merrell Dow* and *Pan American* in favor of its own precedent in *Sparta*. The opinion stated that these cases would not be removable under *Merrell Dow*, but held that they were nevertheless removable under *Sparta*. Pet. App. 18a-19a. The opinion stated that under *Pan American* federal question jurisdiction cannot be exercised on the strength of Section 825p of the FPA, but held, "as compelled by *Sparta*," that the district court properly exercised removal jurisdiction under Section 825p. *Id.* at 22a & n.10.

1. The Opinion Explicitly Conflicts with *Pan American*.

The opinion cannot be reconciled with *Pan American*, which holds that federal jurisdiction cannot be exercised under section 22 of the Natural Gas Act (the "NGA"), 15 U.S.C. § 717u – a provision identical to Section 825p of the FPA – if the claim alleged does not otherwise meet the requirements for original federal question jurisdiction. *Pan American*, 366 U.S. at 662-665.

The Court of Appeals tried to create a distinction by implying that a filed tariff was crucial in these cases but unimportant in *Pan American*. Pet. App. 21a-22a. But there is no contrast. In *Pan American*, the sellers' entire argument was that the contracts sued upon were filed

pursuant to an order of the Federal Power Commission, implicated the regulatory regime and concerned obligations arising under the NGA. 366 U.S. at 662. It was in response to this very argument – identical to the rationale the Court of Appeals has now sanctioned as a rule of removal – that this Court held that exclusive jurisdiction cannot be asserted under a provision of the NGA's identically worded counterpart to Section 825p, unless there is also original jurisdiction:

> Nor does § 22 of the Natural Gas Act help petitioners. 'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded.

366 U.S. at 664. Further, this Court instructed that "[t]he foregoing conclusions are not affected by want of explicit limitation to jurisdiction 'arising under' the Natural Gas Act. Such limitation is clearly implied, as the authoritative Committee Reports indicate." *Id.* at 665 n.2.

The rule of *Pan American* cannot be harmonized with the Ninth Circuit's application of the "*Sparta* exception."[6]

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[6] Even if *Sparta* were a correct statement of the law under the Securities Exchange Act of 1934, the Court of Appeals would not have been justified in deviating from *Pan American*. Section 22 of the NGA and Section 825p of the FPA are not only identically worded, they are part of historically related statutory schemes. It is interpretations of the NGA to which courts have looked in interpreting the FPA, and vice versa. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n.7 (1981). In contrast, Section 78aa of the Securities Exchange Act and Section 825p of the FPA share a phrase, but they are not identically worded, and the Securities Exchange Act, unlike the NGA, was not patterned after the FPA.

Under the "*Sparta* exception," Section 825p of the FPA confers exclusive jurisdiction over cases that do not arise under the FPA. Pet. App. 19a. Under *Pan American*, federal courts have exclusive jurisdiction only of cases "arising under" the FPA.[7] *Pan American*, 366 U.S. at 664-665 & n.2.

2. The Opinion Directly Conflicts with *Merrell Dow*.

In *Merrell Dow*, this Court held that:

> a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

478 U.S. at 817 (quoting 28 U.S.C. § 1331). As applied here, the "*Sparta* exception" necessarily conflicts with *Merrell Dow* by allowing the district court to assert removal jurisdiction over a state cause of action that refers to federal law, even though there is no federal right of action for vindication of that federal law.

The Court of Appeals characterized its opinion as an application of "our court's *Sparta* exception" to the rule of *Merrell Dow*, Pet. App. 19a, but it is nothing less than a direct conflict with *Merrell Dow*, as well as other decisions

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[7] The "*Sparta* exception" also conflicts with decisions of other Circuits that adhere to *Pan American*. *See Powers v. South Central United Food & Commercial Workers Unions & Employers Health & Welfare Trust*, 719 F.2d 760, 764-765 (C.A.5 1983); *Exxon Corp. v. Hunt*, 683 F.2d 69, 73-74 (C.A.3 1982).

of this Court that precede and follow it. The court tried to distinguish *Merrell Dow* on the grounds that "the only jurisdictional provision implicated" in that case was 28 U.S.C. § 1331, while these cases involve federal question jurisdiction under another statute, 16 U.S.C. § 825p. Pet. App. 18a-19a. In fact, 28 U.S.C. § 1331 was not the only jurisdictional provision implicated in *Merrell Dow*. The removal statute, 28 U.S.C. § 1441, was also in issue. *See* 478 U.S. at 806 & n.1, 808. The Court of Appeals' failure to grapple with the removal statute lays bare the conflict.

Removal is purely a creature of statute. The Generators removed the complaints pursuant to 28 U.S.C. § 1441(b). Pet. App. 213a, 219a, 226a. Removal under 28 U.S.C. § 1441(b) that is based on a federal question is subject to the same analytic framework as 28 U.S.C. § 1331. *See, e.g., Merrell Dow*, 478 U.S. at 808. Section 825p does not expressly provide for removal of state claims, nor does the FPA "completely preempt" state claims, so 28 U.S.C. § 1441 was the only possible basis for removal. *See Beneficial,* 539 U.S. at 8; *supra*, p. 11, fn.3. If, as the Court of Appeals recognized, these cases do not satisfy *Merrell Dow* for purposes of determining original federal question jurisdiction under 28 U.S.C. § 1331, then they necessarily fail the same test for removal jurisdiction under 28 U.S.C. § 1441. The conflict with *Merrell Dow* is unavoidable.[8]

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[8] The opinion below also necessarily conflicts with the majority of the other Courts of Appeals, which have hewn to *Merrell Dow*. *See, e.g., Smith v. Industrial Valley Title Ins. Co.*, 957 F.2d 90, 92-93 (C.A.3 1992); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 818-819 (C.A.4 1994); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (C.A.5 1988); *AmSouth Bank v. Dale*, 386 F.3d 763, 777 (C.A.6 2004); *Seinfeld v. Austen*, 39 F.3d 761, 763-764 (C.A.7 1994); *Ernzen v. Ernzen*, 1997 WL 7276 *2

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B. The Conflicts Raise Recurring Issues of Practical Importance.

1. The Opinion Puts the Federal Courts on a Collision Course with State Law Enforcement.

The opinion below puts every federal statute with an exclusive jurisdiction provision on a collision course with state law enforcement. Under the "*Sparta* exception," an exclusive jurisdiction clause is a license to void the well-pleaded complaint rule, rob the State of the right to bring a state law civil enforcement action in state court, and re-characterize any state law claim as federal, just so long as the *conduct* alleged in violation of state law would also violate a standard set by federal law. Unlike "complete preemption," the "*Sparta* exception" to the well-pleaded complaint rule does not require that there be a viable federal claim (let alone a federal remedy) that substitutes for the state claim. As a result, federal courts will, as here, inevitably assert removal jurisdiction only to then dismiss state law enforcement actions. *Cf. Beneficial,* 539 U.S. at 18 (Scalia, J. and Thomas, J., dissenting).

(C.A.10 1997) (unpublished disposition); *Jairath v. Dyer*, 154 F.3d 1280, 1283-84 (C.A.11 1998); *Rogers v. Platt*, 814 F.2d 683, 688 (C.A.D.C. 1987). The First and Second Circuits have left open the question of whether *Merrell Dow* requires a federal right of action in all cases where jurisdiction is asserted because some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims. *See Templeton Board of Sewer Commissioners v. American Tissue Mills of Massachusetts, Inc.*, 352 F.3d 33, 37-40 (C.A.1 2003); *Bracey v. Board of Education of City of Bridgeport*, 368 F.3d 108, 114 & n.5 (C.A.2 2004). *But see City of Rome, N.Y. v. Verizon Communications, Inc.*, 362 F.3d 168, 176-177 (C.A.2 2004) (suggesting that the Second Circuit understands that this Court's decision in *Beneficial* limited removal of state claims to just two circumstances: where there is "complete preemption" or where a federal statute explicitly allows for removal of state claims).

This has profound implications for federalism. States have a sovereign interest in law enforcement that encompasses defining the law, seeing that it is obeyed, and punishing those who transgress. This enforcement interest is a quintessential aspect of sovereignty and provides sufficient reason for allowing a State to litigate in its own courts. *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1242 (2004). This Court has scrupulously avoided conflicts with state law enforcement, confirming the legitimacy of the State's unwillingness to have its cases decided in federal court. *See Franchise Tax Board*, 463 U.S. at 22 n.22 (noting that a State "may often be willing to go to great lengths to avoid federal-court resolution of a preemption question" and that "[a]ccordingly, . . . considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it"). This Court has cautioned against anticipating collisions between state police power and federal authority where there are none. *See State of Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 189 (1901). The opinion below, however, insures that there will be more conflicts between the federal courts and state law enforcement.

2. The Opinion Upsets the Balance of State and Federal Judicial Authority.

The opinion expands the scope of removal jurisdiction generally, and in so doing upsets the delicate balance between state and federal judicial authority. The "'well-pleaded complaint' rule . . . as a practical matter severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to

federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts." *Franchise Tax Board*, 463 U.S. at 9-10. Where the "*Sparta* exception" abrogates the rule, more federal-state conflicts are likely to result. Defendants prevail more often in cases removed to federal court. *See generally* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 581-582 (1998). Where the well-pleaded complaint rule no longer applies, federal-state conflicts will proliferate as defendants exercise their expanded right to removal.

3. The Opinion Is Detrimental to the Credibility and Management of the Federal Judicial System.

Generalized application of the "*Sparta* exception" to the law of removal makes removal more complex and unpredictable, to the detriment of the management and credibility of the federal court system. Abrogation of the well-pleaded complaint rule will result in unpredictable, ad hoc determinations about what is "really" a federal claim, and what is not. Unlike the "complete preemption" exception to the well-pleaded complaint rule, in which the scope of a federal enforcement provision circumscribes the range of state claims that may be removed, *see Caterpillar*, 482 U.S. at 394-399, *Franchise Tax Board*, 463 U.S. at 24-25, the "*Sparta* exception" has no limits or standards for its application.[9] Any state claim can be restated as federal

[9] Uncertainty is already widespread in the lower courts that use the "artful pleading" doctrine outside the complete preemption context.

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because there is no federal cause of action at all. The limit of re-characterization of state law claims ends at the limit of an individual judge's imagination and the Constitution itself. Inevitably, a perception of unfairness will result when litigants cannot predict outcomes within a reasonable range. *See* Friedman, *supra*, 104 Colum. L. Rev. at 1224 & n.32 (arguing that litigants should be able to know the rules and predict outcomes). This perception will damage the credibility and authority of the courts.

In addition, the "*Sparta* exception" is detrimental to the management of the federal judicial system because it adds another level of complexity to the jurisdictional determination. Federal jurisdiction is already highly complex. *See* American Law Institute, Federal Judicial Code Revision, Part I, App. A, *Reporter's Memorandum on the Claim-Specific Nature of the Original Jurisdiction of the District Courts*, *reprinted in* 19A Federal Practice & Procedure, Jurisdiction Apps. 759, 767 (ALI 2004) (noting that "the structure of federal jurisdiction at times seems more like the recursive, helical structure of life itself at the level of protein and gene"). Whatever its drawbacks, the great

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Compare Bryan v. BellSouth Communications, Inc., 377 F.3d 424, 429-432 (C.A.4 2004), *petition for cert. filed*, 73 U.S.L.W. 3338 (U.S. Nov. 22, 2004) (No. 04-705), *with Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1291-1293 (C.A.11 2004). Even in the context of complete preemption, the extent to which courts are willing to re-characterize state claims as being within the scope of an exclusive federal enforcement provision varies widely. *See Roddy v. Grand Trunk Western Railroad Inc.*, ___ F.3d ___, 2005 WL 77156 at *5 (C.A.6 2005) (discussing inter-circuit conflict on the scope of complete preemption of claims under the Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188); *King v. Marriott International, Inc.*, 337 F.3d 421, 428 (C.A.4 2003) (discussing inter-circuit conflict on the scope of complete preemption of wrongful discharge claims under ERISA, 29 U.S.C. § 1140).

virtue of the well-pleaded complaint rule is that it provides clarity and is "a quick rule of thumb." *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 832 (2002). Further complexity can only add to the number, cost and length of collateral jurisdictional battles. *See* Brianna J. Fuller, *Developments in the Law: Federal Jurisdiction and Forum Selection Development Symposium, Part III, Federal Question Jurisdiction*, 37 Loy. L.A. L. Rev. 1443, 1471 (2004). These proceedings, which were filed in 2002, are perfect exemplars.

II. The Sovereign Immunity of the States to Avoid Removal of State Law Enforcement Proceedings Is One Of National Importance and First Impression.

Eleventh Amendment sovereign immunity as a bar to involuntary removal of a state's claim from state court is an issue of first impression in this Court, one that is critical to the balance of federalism and requires national uniformity. Because this question is very likely to recur if the scope of removal jurisdiction is expanded in accord with the opinion below, the writ should issue.

A. The Circuits Are Divided.

Although the question of state sovereign immunity presented is one of first impression here, the Courts of Appeals in the Eighth, Ninth, and Tenth Circuits have split on whether forcing a state to litigate in federal court violates the Eleventh Amendment.[10]

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[10] An appeal pending in the Fifth Circuit, *Newby v. Enron Corp.*, Case No. 04-20698, also addresses whether state sovereign immunity

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In *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 506 (C.A.8 1995), the Eighth Circuit held that coercive joinder of a state agency in federal court proceedings violated the Eleventh Amendment. It concluded that "concern and respect for state sovereignty are implicated *whenever a state is involuntarily subjected to an action*, regardless of the role it is forced to play in the litigation." *Id.* (emphasis added). In *Thomas*, the district court permitted an alleged polluter's involuntary joinder of the Missouri Department of Natural Resources in an action under CERCLA. The Department, which had expressed an intent to seek remediation from the alleged polluter in the future, was joined as a defendant for technical reasons but was to be realigned later as a plaintiff. No party asserted claims against the Department. The Department appealed the involuntary joinder on Eleventh Amendment grounds.

The Eighth Circuit held that sovereign immunity barred coercive joinder because that joinder would force the Department to prosecute its claims "at a time and place dictated by the federal courts. This disrespect for state autonomy in decision-making is precisely what the Eleventh Amendment was intended to avoid." 50 F.3d at 505-506. Even if the bare text of the Amendment supplied the only basis for sovereign immunity, the court held, it would forbid coercive joinder of a state agency. If a suit is "against" the state when "the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act,'" then compelling a state to be an involuntary plaintiff in federal court would also be a suit "against" the state for purposes of the Eleventh Amendment, and would

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bars involuntary removal. *See* Brief of Plaintiff-Appellant Retirement Systems of Alabama, 2004 WL 3106446.

be barred. 50 F.3d at 505 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)).

The Eighth Circuit's focus on state autonomy cannot be reconciled with the decision of the Ninth Circuit in these cases, or with the Tenth Circuit decision in *Oklahoma v. Magnolia Marine Transport Co.*, 359 F.3d 1237 (C.A.10 2004). The Ninth and Tenth Circuit decisions rejected the Eighth Circuit approach in favor of a more literal approach to the Eleventh Amendment. In so doing, both held that sovereign immunity is no bar to coercive removal of a state-filed action by a private party. The Ninth Circuit principally relied on *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821), *Ames v. Kansas*, 111 U.S. 449 (1884), and a review of the "meaning, purpose and history of sovereign immunity and the Eleventh Amendment," to conclude that the Eleventh Amendment was intended only to protect defendant states. Pet. App. 30a. Similarly, in *Magnolia Marine*, 359 F.3d at 1239-1240, the Tenth Circuit relied on the text of the Eleventh Amendment, *Regents of the University of California v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (C.A.Fed. 1997), on language in *Ames*, and on lower court cases relying on *Ames* to rule against the state. In *Thomas*, by contrast, the Eighth Circuit held that the Eleventh Amendment applies when a state is a plaintiff, but the analysis shifts to whether the state has waived its immunity. *See* 50 F.3d at 506; *infra*, p. 26, fn.13.

B. The Opinion Disregards Controlling Supreme Court Precedent.

The opinion disregarded the presumption, first outlined in *Hans v. Louisiana*, 134 U.S. 1 (1890), and recently

affirmed in *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 755 (2002), that the sovereign immunity reserved to the States by the Eleventh Amendment bars proceedings against States that would have been "'anomalous and unheard of when the Constitution was adopted.'" *Federal Maritime Comm'n*, 535 U.S. at 755. The "*Hans* presumption" guides the inquiry into the scope of sovereign immunity where history and the text of the Amendment are silent. *See id.* at 753-756.

In the absence of controlling precedent to the contrary, the *Hans* presumption compels the conclusion that the Eleventh Amendment does not permit a private party to drag an unwilling state sovereign before a judicial tribunal in a manner unheard of at the time the Constitution was adopted.[11] *Id.* at 755, 760. Because the lower federal courts did not have federal question jurisdiction until 1875, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69-70 (1996), and because our system of dual sovereigns did not exist before the Constitution created it, removal of an action filed by a state to federal court from state court on federal question grounds would have been "anomalous and unheard of" at the time the Constitution was adopted. *Hans*, 134 U.S. at 18; *cf. Federal Maritime Comm'n*, 535 U.S. at 755.

In disregarding this presumption, the opinion violated the fundamental sovereign immunity guarantee of the

[11] The *Hans* presumption reflects, among other things, a recognition that states are not like other litigants. The preeminent purpose of sovereign immunity is to accord states the dignity that is consistent with their status as sovereign entities. *Federal Maritime Comm'n*, 535 U.S. at 760. Treating the state like any other litigant for purposes of removal and remand diminishes the respect it is due as sovereign.

Eleventh Amendment: "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy,* 506 U.S. 139, 146 (1993) (citation and internal quotation marks omitted).

C. If Federal Removal Jurisdiction Is Expanded, the Boundaries Of State Sovereign Immunity Will be Confronted On a Regular Basis.

This Court has repeatedly underscored the importance of state sovereign immunity to our system of federalism. *See, e.g., Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985). The sovereign immunity issue presented here is a novel one of particular significance for state law enforcement. To drag a state before a federal tribunal for adjudication of a state-law enforcement action deprives it of its interest in having its statutes construed and applied by its own courts in the first instance, and reflects the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare,* 411 U.S. 279, 294 (1973) (Marshall, J. and Stewart, J., concurring).

As highlighted by the split between the circuits, the lower courts require further guidance to resolve issues of sovereign immunity that have not yet been decided by this Court: whether to focus on the extent to which the action at issue constitutes an "unanticipated intervention in the processes of government," *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 53-54 (1944), or to limit the scope of

sovereign immunity to the text of the Eleventh Amendment unless history or decisions of this Court explicitly mandate otherwise. This need for guidance is critical for all states seeking to protect their own citizens in their own courts. If they file in state court and are forced into federal court, they face a Hobson's choice: prosecute in federal court or not at all. Putting states in this situation undermines their sovereignty by depriving them of their ability to demonstrate to their citizens that they can vindicate their own laws in their own courts.

The bar of state sovereign immunity becomes even more significant in cases such as this, where a state unexpectedly finds that its state-law action has been alchemized into a federal case.[12] If the well-pleaded complaint rule no longer operates to help us avoid potentially serious state-federal conflicts, more cases will be removed and this constitutional issue will be reached more often. It is no coincidence that three of the courts of appeals have

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[12] The opinion increases exponentially the opportunities for undermining the balance of federalism by simultaneously expanding the scope of removal jurisdiction and relaxing the standard for finding a waiver of sovereign immunity. After concluding that sovereign immunity did not bar removal, the opinion added that by "voluntarily appear[ing] in state court to press its claims against the companies, who predictably sought removal to what they perceived to be a more favorable forum," the State waived any claim of sovereign immunity. Pet. App. 32a. If a state can waive sovereign immunity by filing a state-court action arising under state law and opposing the exercise of federal jurisdiction at every opportunity, it has no immunity at all. But the standard for waiver is more stringent; it generally requires either that the state voluntarily invoke federal court jurisdiction, or make a clear declaration that it intends to submit itself to such jurisdiction. *E.g.*, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999); *see Lapides v. Board of Regents*, 535 U.S. 613, 620 (2002) (waiver not implicated where a state's federal court participation is involuntary).

reached the same issue, for the first time, within months of one another. *See supra,* at pp. 21-22 & fn.10. In an environment in which federal removal jurisdiction is expanding, constitutional questions of sovereign immunity arise more frequently and have a more prominent role to play in maintaining the balance between the states and the federal government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 27, 2005

Respectfully submitted,

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375 F.3d 831

United States Court of Appeals,
Ninth Circuit.

People of the State of CALIFORNIA, ex rel; Bill LOCKYER, Attorney General, Attorney General of the State of California, Plaintiffs-Appellants,

v.

DYNEGY, INC.; Dynegy Power Marketing, Inc.; NRG Energy, Inc.; Xcel Energy, Inc.; West Coast Power LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; El Segundo Power LLC; Long Beach Generation LLC, Defendants-Appellees.

People of the State of California, ex rel Bill Lockyer, Attorney General of the State of California; Bill Lockyer, Attorney General, Attorney General of the State of California, Plaintiffs-Appellants,

v.

Reliant Energy, Inc., Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources, Inc.; Reliant Energy Coolwater, LLC; Reliant Energy Ellwood, LLC; Reliant Energy Etiwanda, LLC; Reliant Energy Mandalay, LLC; Reliant Energy Ormond Beach, LLC, Defendants-Appellees.

People of the State of California, ex rel Bill Lockyer, Attorney General of the State of California; Bill Lockyer, Attorney General, Attorney General of the State of California, Plaintiffs-Appellants,

v.

Mirant Corporation; Mirant California, L.L.C.; Mirant Potrero L.L.C.; Mirant Americas Energy Marketing, L.P.; Mirant California Investments, Inc.; Mirant Americas Inc.; Southern Energy Golden States Holdings, Inc., Defendants-Appellees.

People of the State of California, ex rel.
Bill Lockyer, Attorney General,
Attorney General of the State of California,
Plaintiff-Appellant,

v.

Reliant Energy, Inc.; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources, Inc.; Reliant Energy Coolwater, LLC; Reliant Energy Ellwood, LLC; Reliant Energy Etiwanda, LLC; Reliant Energy Mandalay, LLC; Reliant Energy Ormond Beach, LLC; Mirant Corporation; Mirant California, L.L.C.; Mirant Delta, L.L.C.; Mirant Potrero LLC; Mirant Americas Energy Marketing, L.P.; Mirant California Investments, Inc.; Mirant Americas, Inc.; Southern Energy Golden States Holdings, Inc.; Dynegy, Inc.; Dynegy Power Marketing, Inc.; Nrg Energy, Inc.; Xcel Energy, Inc.; West Coast Power, L.L.C.; Cabrillo Power I, L.L.C.; Cabrillo Power II LLC; El Segundo Power, L.L.C.; Long Beach Generation LLC,
Defendants-Appellees.

Nos. 02-16619, 03-15588, 02-16625, 02-16629.

Argued Aug. 12, 2003.
Submitted as to all parties except NRG Energy, Inc. Oct. 27, 2003.*

Submitted as to NRG Energy, Inc. April 15, 2004**

Filed July 6, 2004.

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* The court had deferred submission pending receipt of a bankruptcy court order granting limited relief from the automatic stay in the proceedings of Mirant Corporation and its affiliated debtors.

** At the time of submission as to the other parties, the appeal was not submitted as NRG Energy, Inc. ("NRG"), which was in bankruptcy proceedings, and whose appeal had accordingly been stayed by this court's order of May 30, 2003. The court vacated its stay on April 15, 2004, and, consistent with the parties' stipulation, deemed the case submitted as to NRG.

Tamar Pachter, Deputy Attorney General, State of California, San Francisco, CA, argued the case for the appellant and was on the briefs. Attorney General Bill Lockyer, and Thomas Greene, Damon Connolly, Danette Valdez, Pamela Merchant, Paul Stein, and Laura Zuckerman, Office of the Attorney General, were also on the briefs.

Terry J. Houlihan, Bingham McCutchen LLP, San Francisco, CA, argued the case for the appellees and was on the joint briefs of the appellees, as attorney for appellees Reliant Energy, Inc.; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources, Inc.; Reliant Energy Coolwater, Inc.; Reliant Energy Ellwood, Inc.; Reliant Energy Etiwanda, Inc.; Reliant Energy Mandalay, Inc.; and Reliant Energy Ormond Beach, Inc. Nora Cregan and Thomas S. Hixson were also on the joint briefs as attorneys for the same parties.

John M. Grenfell, Douglas R. Tribble, and Michael J. Kass, Pillsbury Winthrop LLP, San Francisco, CA, were on the joint briefs of the appellees, as attorneys for appellees Dynegy, Inc.; Dynegy Power Marketing, Inc.; West Coast Power, LLC; Cabrillo Power I, LLC; Cabrillo Power II, LLC; El Segundo Power, LLC; and Long Beach Generation, LLC.

John A. Sturgeon and Bryan A. Merryman, White & Case LLP, Los Angeles, CA, were on the joint briefs of the appellees, as attorneys for appellees Mirant Corporation; Mirant California, LLC; Mirant Delta, LLC; Mirant Potrero, LLC; Mirant Americas Energy Marketing, LP; Mirant California Investments, Inc.; Mirant Americas, Inc.; and Southern Energy Gold States Holdings, Inc.

David T. Peterson and Theodore G. Spanos, Morgan, Lewis & Brockius LLP, Los Angeles, CA, were on the joint

briefs of the appellees, as attorneys for appellee Xcel Energy, Inc.

Carlton A. Varner and Timothy B. Taylor, Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, CA, were on the joint briefs of the appellees, as attorneys for appellee NRG Energy, Inc.

Attorney General Christine O. Gregoire, Seattle, WA, and Tina E. Kondo and W. Stuart Hirschfeld, Office of the Attorney General; and Attorney General Hardy Myers, Salem, OR, and Robert T. Roth and Colin A. Yost, Office of the Attorney General; were on the brief of amici curiae State of Washington and State of Oregon in support of plaintiff.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. Nos. CV-02-01854-VRW, CV-02-01791-VRW, CV-02-01914-VRW.

Before: CYNTHIA HOLCOMB HALL, DIARMUID F. O'SCANNLAIN, and EDWARD LEAVY, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether federal removal jurisdiction lies over California state court actions alleging that several power companies fraudulently failed to deliver reserve energy that might otherwise have helped to avert the state's energy crises of 2000 and 2001.

I

Far-reaching economic and regulatory changes in one of the largest electric energy markets in the world provide the backdrop to this litigation. We begin with some context necessary to understanding the legal claims before us.

A

California adopted an energy policy in the mid-1990s that broke new ground in important respects. Prior to the events at issue here, California consumers had long relied upon investor-owned utilities regulated by the California Public Utilities Commission ("CPUC") for the generation, transmission, and distribution of electricity. The traditional regulatory policy came under review in the mid-1990s, however, as ascendant free market philosophies and "changes in federal law intended to increase competition in the provision of electricity" prompted policymakers to rethink traditional assumptions underlying the market's structure. 1996 Cal. Adv. Legis. Serv. 854, *1 (Deering). Perhaps the culmination of this rethinking was California's decision in 1996 to initiate an aggressive market experiment to deregulate and to restructure its electricity markets. Noting the energy industry restructuring already underway, the California Legislature decided that reshaping the market for California energy could help provide competitive, lower cost and reliable electricity service, while preserving the state's commitment to developing diverse, environmentally sensitive electricity resources. *Id.* Assembly Bill 1890 ("AB 1890") established the legal structure for the deregulation and restructuring plan. *Id.*

That legislation formed two non-governmental entities to orchestrate the transmission and sale of electricity: the Independent System Operator ("ISO") and the Independent Power Exchange ("PX"), both of which are California non-profit, public benefit corporations. *See* 1996 Cal. Adv. Legis. Serv. 854. At the same time, the CPUC authorized the investorowned utilities to sell electricity generation plants to other entities, including to some of the parties in

this litigation. Until it ceased operations in 2001, the PX was a crucial hub of the electricity generation market, overseeing an auction system for the sale and purchase of electricity on a nondiscriminatory basis to meet the electricity loads of exchange customers. As a public utility under the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.*, the PX was subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), and it operated pursuant to FERC-approved tariffs and FERC-approved wholesale rate schedules.

Responsibility in turn for the efficient functioning of the high-voltage transmission grid fell to the ISO, which operates to this day. The ISO manages the flow of electricity across the grid and balances supply and demand in real time. Its operations are governed by a Tariff and Protocols on file with and approved by FERC. To maintain the grid, the ISO procures both "imbalance energy" (energy needed to balance the grid) and ancillary services ("operating reserves" or "reserve capacity") through various market auction processes. Such procurement ensures that generation (i.e., supply) and load (i.e., demand) remain in balance at all times. Producers that seek to sell imbalance energy or ancillary services to the ISO enter a standard agreement with the ISO. The ISO also designates and authorizes entities as "scheduling coordinators," which represent producers and purchasers and submit energy schedules to the ISO specifying predicted energy production and usage over the next day. The scheduling coordinators enter a standard agreement and are the only entities that can submit bids to sell imbalance energy and ancillary services to the ISO.

Imbalance energy and ancillary services are distinct products procured through different market programs.

The imbalance energy market is the so-called "real time" market, in which bids to supply energy are made no later than 45 minutes prior to the operating hour. The ISO ranks the supply bids and purchases the required energy, paying all successful suppliers at the market-clearing price. Ancillary services, in contrast, represent generating *capacity* that can be converted to energy and delivered to the grid in response to uncertain events, such as major plant outages, upon receiving an ISO dispatch order. The ancillary services supplier warrants that it will comply with ISO dispatch orders if the bid is accepted. Accordingly, it must hold its capacity in reserve during the potential production period, and it receives payment for doing so, even if no dispatch order is made. Thus, if the ISO orders the producer to supply energy, the supplier receives payment both for its withheld capacity and for the energy it was called upon to supply. The ISO's operations are governed by a tariff on file with and approved by FERC.

B

At issue in this litigation are the producers' and scheduling coordinators' activities in the ancillary services market, particularly as brought to light during the electricity crises of 2000 and 2001. According to the state, the crises created rolling blackouts, endangered citizens' health and safety, damaged the state's economy, and were resolved only by the state's purchase of expensive alternative long-term energy contracts. California partly blames the allegedly fraudulent business practices of several producers and traders of wholesale electricity (including all appellees, collectively, the "companies") for the crisis, and it has filed numerous lawsuits against them, of which

these are but a few. The cases consolidated before us state California's causes of action against the companies for violating state unfair competition law with respect to the ancillary services market.

Put succinctly, California claims that the producers fraudulently sold energy on the spot market from reserve capacity that they had contracted to hold in reserve. California claims that although the companies received payment for their commitment of reserve capacity, they were often unable to respond to ISO dispatch orders when called upon to remedy market imbalances. Because the grid's stability requires that the ISO balance electricity supply with demand on the grid, on an hourly basis, and because the companies were allegedly unable to respond to dispatch orders, the ISO was forced to attempt to find alternative energy sources during the periods of shortage. According to this theory, the companies' unauthorized sale of ancillary services energy threatened the stability of the grid system and left residents of the state vulnerable to blackouts and other disruptions.

C

There are two district court orders now before us on appeal, and it is necessary to trace the history of the litigation to understand their significance. The Attorney General of California filed lawsuits in San Francisco County Superior Court, seeking injunctions, restitution, disgorgement, and civil penalties against multiple companies for double-selling reserve generation capacity in violation of the California Business & Professions Code. *See* CAL. BUS. & PROF. CODE § 17200 *et seq.* The companies removed the cases to the U.S. District Court for the

Northern District of California. California then moved to remand, reasoning that the district court lacked subject matter jurisdiction and that California enjoyed sovereign immunity under the Eleventh Amendment, which, it contends, barred the district court from exercising jurisdiction. *See* 28 U.S.C. § 1447(c); U.S. CONST. amend. XI. The companies opposed the remand motions and also moved to dismiss. The district court denied the remand motions on August 6, 2002.

California filed notices of appeal (the "interlocutory appeals") and moved to stay further district court proceedings. In turn, the companies moved in district court to certify the interlocutory appeals as frivolous. Meanwhile, California filed an emergency motion in this court to stay further district court proceedings. That same day, a motions panel consolidated California's interlocutory appeals (along with several related cases). While our court was in the process of scheduling briefing and hearing of the interlocutory appeals, the district court denied the motion to stay and granted the companies' motion to certify the interlocutory appeals as frivolous. California then filed a second emergency motion for a temporary stay with this Court, seeking to prevent the District Court from ruling on the pending motions to dismiss. A motions panel denied both pending emergency motions.

The companies next moved to dismiss the interlocutory appeals for lack of appellate jurisdiction, or alternatively to strike part of the opening brief. A motions panel denied the motion to dismiss without prejudice and referred the motion to strike to the merits panel. Several collateral claims were also settled and dismissed voluntarily. The motions panel set an expedited schedule for briefing and hearing of the interlocutory appeals.

On March 25, 2003, before the briefing of the interlocutory appeals was complete, the District Court granted the companies' motion to dismiss and directed entry of final judgment on the merits. California timely appealed and also moved to stay the interlocutory appeals, to consolidate them with the appeal from the district court's final judgment on the merits, and to expedite briefing and hearing of these appeals. On April 9, 2003 a motions panel granted this motion in its entirety, and the consolidated appeals were duly set for expedited argument before us.[1]

Before us, then, are appeals from two orders: the district court's denial of remand to state court and its dismissal of California's unfair competition claims on the merits.

II

We must first decide whether the district court had removal jurisdiction over this action.[2] *See* 28 U.S.C.

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[1] On May 19, 2003, a motions panel granted the companies' motion to have a single merits panel hear several appeals involving other causes of action brought by California arising out of the energy crises. On May 30, 2003, however, the motions panel rescinded the order and established an accelerated briefing schedule for the ancillary services appeal before us. The other appeals were assigned to different merits panels.

[2] The companies argue that we lack appellate jurisdiction over the interlocutory appeals, and ask that the relevant portions of the state's brief be struck. *See* 28 U.S.C. § 1291(permitting appeals of "final decisions of the district courts"); *Digital Equip. Corp. v. Desktop Direct,* 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (noting that exceptions to the general rule permitting a single appeal are to be interpreted narrowly). Now that the interlocutory appeal has been consolidated with the district court's final judgment on the merits, this consolidated appeal constitutes the single appeal "in which claims of

(Continued on following page)

§ 1447(c). First, California contends that the district lacked jurisdiction under 28 U.S.C. § 1331 and 16 U.S.C. § 825p; and second, it urges that the Eleventh Amendment also bars removal. We consider each issue in turn.

A

1

"The jurisdictional structure at issue in this case has remained basically unchanged for the past century." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 7, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). Subject to certain exceptions not applicable here, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). If the district court at any time determines that it lacks jurisdiction over the removed action, it must remedy the improvident grant of removal by remanding the action to state court. 28 U.S.C. § 1447; *see ARCO Envtl. Remediation, LLC v. Dep't of Health and Envtl. Quality,* 213 F.3d 1108, 1113 (9th Cir.2000). The removal statute is strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute. *Ethridge v. Harbor House Rest.,* 861 F.2d 1389, 1393 (9th Cir.1988).[3]

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district court error at any stage of the litigation may be ventilated." *Id.* at 868, 114 S.Ct. 1992. Accordingly, we deny the motion to strike.

[3] We review de novo the denial of a motion to remand an action to state court for want of removal jurisdiction. *Ethridge,* 861 F.2d at 1393.

We confront in this case what Justice Frankfurter termed the "litigation-provoking problem," *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 470, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957) (Frankfurter, J., dissenting), of "the presence of a federal issue in a state-created cause of action." *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 809-810, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). In determining the presence or absence of federal jurisdiction, we apply the "'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *see also Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908). "A defense is not part of a plaintiff's properly pleaded statement of his or her claim." *Rivet v. Regions Bank,* 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998); *see Franchise Tax,* 463 U.S. at 10-11, 103 S.Ct. 2841 ("[A] federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, or that a federal defense the defendant may raise is not sufficient to defeat the claim." (internal citations omitted)). Rather, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank in Meridian,* 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70 (1936). The federal issue "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Id.* at 113, 57 S.Ct. 96 (noting that the federal controversy cannot be "merely a possible or conjectural one"). Thus the rule enables the plaintiff, as "master of the complaint," to

"choose to have the cause heard in state court" "by eschewing claims based on federal law." *Caterpillar,* 482 U.S. at 399, 107 S.Ct. 2425.

2

California chose the forum of its own state courts by stating its claims exclusively under California unfair competition laws, which prohibit "any unlawful, unfair, or fraudulent business act or practice," CAL. BUS. & PROF. CODE § 17200, and alleging that the companies converted generation capacity contractually owed to the state.[4] While it repeatedly cites the ISO tariff filed with FERC, it asserts no federal cause of action as such. Nor, though, does the complaint disguise the fact that the ISO tariff binds the companies to important obligations and duties that are relevant and necessary to the state law claim.

Pursuant to the FPA, the ISO must file schedules showing its rates and charges, and the practices and regulations affecting such charges. 16 U.S.C. § 824d(c). The filing enables FERC to determine whether the ISO rules and regulations pertaining to those charges are reasonable, as required by the FPA. *See* 16 U.S.C. § 824d(a). Once filed with a federal agency, such tariffs are the "equivalent of a federal regulation." *Cahnmann v. Sprint Corp.,* 133 F.3d 484, 488(7th Cir.1998); *see Evanns v. AT & T Corp.,* 229 F.3d 837, 840 & n. 9 (9th Cir.2000). Thus, the tariff obligates the generators to maintain

[4] The complaint claims the ISO has an exclusive possessory interest as to "all generating capacity it procures through the ancillary services markets. The ISO's interest includes the right to determine how much energy, if any, should be produced out of the capacity it has procured."

specified reserve capacity in the ancillary services market and bars them from producing output except when directed by an ISO dispatch order. Besides specifying the generators' responsibilities, the tariff also details penalties and remedies for non-compliance.

In denying California's motion to remand to state court, the district court reasoned simply that the complaint presented no independent state law claim. It was, in effect, an attempt to enforce federal tariffs. The claims were necessarily federal in character, and the conduct the state sought to condemn was expressly governed by the ISO tariffs.

3

California now asserts, as it did before the district court, that the Supreme Court's decision in *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1960), and the well-pleaded complaint rule, require remand. The companies, by contrast, point, inter alia, to *Sparta Surgical Corp. v. National Association of Securities Dealers,* 159 F.3d 1209 (9th Cir.1998). Both cases are relevant to the meaning and applicability of the FPA's exclusive jurisdiction provision, *see* 16 U.S.C. § 825p, and we confront this question first.

a

The FPA applies to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b); *see also id.* at § 824(d) (defining "sale of electric energy at wholesale"). Section 317 of the FPA, 16 U.S.C.

§ 825p, consists, in pertinent part, of the following jurisdictional provision:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

16 U.S.C. § 825p. Because a violation of or suit to enforce the tariff, which has the same effect as an order or regulation, plainly falls within the language of § 825p, the companies contend that our jurisdictional inquiry can end here. *See T & E Pastorino Nursery v. Duke Energy Trading & Mktg., L.L.C.,* 268 F.Supp.2d 1240, 1245-47 (S.D.Cal.2003) (denying remand of state unfair trade practices claim alleging violations of tariff governing ancillary services market).

b

We addressed an analogous question in *Sparta. Sparta* interprets a similarly worded jurisdictional provision within the Securities Exchange Act of 1934 ("Exchange Act"). *See* 15 U.S.C. § 78aa.[5] The Exchange Act

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[5] The Exchange Act provides:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

15 U.S.C. § 78aa.

authorizes the National Association of Securities Dealers ("NASD") to adopt rules and by-laws governing its association, among which include the decision to list, not to list, or to de-list an offering. *Sparta,* 159 F.3d at 1212. The plaintiff in *Sparta* filed a state court suit alleging "a variety of state common-law claims, including breach of express and implied contract, breach of the covenant of good faith and fair dealing, gross negligence, intentional misrepresentation, negligent misrepresentation, and interference with economic relations" against NASD and the Nasdaq Stock Market, Inc. ("NASDAQ"). *Id.* at 1211. The gravamen of the allegation was that the NASD and NASDAQ had improperly de-listed and suspended trading in Sparta stock on the opening day of the firm's public offering, rendering the offering unmarketable.

The defendants removed to federal district court, which, we concluded, had properly exercised jurisdiction over the action. We explained that though the plaintiff framed its lawsuit as a state law claim, the alleged misconduct in its treatment of offering "must be exclusively determined by federal law" because the viability of the claim "depends on whether the association's rules were violated." *Id.* at 1212. Indeed, we explained: "If NASD's action conformed to the rules, there can be no viable cause of action; if its action violated the rules, any claim falls under the imperative of 15 U.S.C. § 78aa which grants the federal courts 'exclusive jurisdiction of violations of this chapter of the rules and regulations thereunder. . . .'" *Id.* We reasoned that "[t]he rule that state law claims cannot be alchemized into federal causes of action by incidental reference . . . has no application when relief is partially predicated on a subject matter committed exclusively to federal jurisdiction." *Id.* at 1212-13. *See generally Lippitt*

v. Raymond James Fin. Servs., 340 F.3d 1033, 1042-43(9th Cir.2003) ("A careful reading of artful pleading cases shows that no specific recipe exists for a court to alchemize a state claim into a federal claim – a court must look at a complex group of factors in any particular case to decide whether a state claim actually 'arises' under federal law.").

In the case before us, as in *Sparta*, relief is "predicated on a subject matter committed exclusively to federal jurisdiction." *Id.* at 1213. The state lawsuit turns, entirely, upon the defendant's compliance with a federal regulation.[6] The tariff defines the companies' contractual obligation with respect to the conduct at issue. Absent a

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[6] The very face of California's complaint betrays that the gravamen of the complaint is the companies' alleged violations of federal tariff obligations. It repeatedly cites the federal tariff and alleges that the companies violated the agreement embodied within it. While California insists that the district court was obliged to remand if at least one independent state law theory of relief existed, *see Duncan v. Stuetzle*, 76 F.3d 1480, 1486 (9th Cir.1996) ("[I]f a single state-law based theory of relief can be offered for each of the three causes of action in the complaint, then the exercise of removal jurisdiction was improper."), we do not discern any such claim. According to California, the state unfair competition's disjunctive phrasing permits relief for practices that are *either* "unfair, unlawful, or fraudulent." *See* CAL. BUS. & PROF. CODE § 17200. With respect to unlawfulness, California urges that the companies improperly converted property to which the ISO had the exclusive right of possession and control. Yet this claim is based entirely on alleged tariff obligations (i) to hold ancillary services capacity in reserve prior to receipt of an ISO dispatch instruction and (ii) to comply with ISO's dispatch instructions. The federal tariff wholly governs the lawfulness of the companies' conduct. Similarly, with respect to the "unfair" and "fraudulent" terms, the claims depend entirely upon the federal tariff. *Cf. Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 182, 83 Cal.Rptr.2d 548, 973 P.2d 527 (Cal.1999) ("Courts may not simply impose their own notions of the day as to what is fair or unfair.").

violation of the FERC-filed tariff, no state law liability could survive.[7]

c

Despite *Sparta,* California argues that no federal jurisdiction lies because there is no statutorily conferred right of action in federal court. Ordinarily, of course, federal jurisdiction does not lie under 28 U.S.C. § 1331 where there is no right of action conferred by federal statute. *See Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 817, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) ("[A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" (citing 28 U.S.C. § 1331)); *see also Utley v. Varian Assoc.,* 811 F.2d 1279, 1283 (9th Cir.1987). *Sparta* establishes, however, that the exclusive jurisdiction provision takes the case outside of the rule of *Merrell Dow* and *Utley,* which otherwise might bar the action if the only jurisdictional

[7] California also cites *Lippitt v. Raymond James Fin. Servs.,* 340 F.3d 1033 (9th Cir.2003), in which we reversed the district court's decision to retain removal jurisdiction. *Lippitt* involved a private attorney general's lawsuit under Cal. Bus. & Prof.Code § 17200 *et seq.* against several brokerage firms for sales and marketing practices associated with certain investment products. *Lippitt,* 340 F.3d at 1036. In that case, however, we found clear Congressional recognition of state competence in the securities field, *see Lippitt,* 340 F.3d at 1037 (citing 15 U.S. § 78bb), and explicitly distinguished *Sparta,* noting that "[u]nlike the situation[ ] in *Sparta* . . . a state court need not inquire into NYSE regulations, or even refer to federal law, in the case before us." *Lippitt,* 340 F.3d at 1045. Here, by contrast, the reference to and necessity of relying upon federal law is unavoidable.

provision implicated were 28 U.S.C. § 1331. Because there was no federal cause of action for Sparta's claim, there would have been no jurisdiction predicated solely on 28 U.S.C. § 1331. *Sparta,* 159 F.3d at 1212. Yet the claim lay "not under 28 U.S.C. § 1331, but under 15 U.S.C. § 78aa." *Id.* "Thus, neither *Merrell Dow* nor *Utley* divested the district court of jurisdiction. . . ." *Id.* Similarly, in the case before us, the exclusive jurisdiction provision seemingly falls within our court's *Sparta* exception to *Merrell Dow* and *Utley.*

d

California also argues that *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1960), requires remand. *Pan American,* decided under the Natural Gas Act, 15 U.S.C. 717 et seq.,[8] addressed a substantially identical exclusive jurisdiction provision.[9] At issue in *Pan American* was a common law

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[8] The FPA and the Natural Gas Act ("NGA") are similar statutory schemes, and that the Supreme Court has held that the applicable case law for the two Acts is often interchangeable. *See Ark. La. Gas Co. v. Hall,* 453 U.S. 571, 578 n. 8, 101 S.Ct. 2925, 69 L.Ed.2d 856 ("[T]he relevant provisions of the two statutes are in all material respects substantially identical. . . . [W]e therefore follow our established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes."); *Permian Basin Area Rate Cases,* 390 U.S. 747, 820-821, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968); *FPC v. Sierra Pacific Power Co.,* 350 U.S. 348, 353, 76 S.Ct. 368, 100 L.Ed. 388 (1956).

[9] The Natural Gas Act provision states:

> The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to

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contract dispute between a natural gas producer (Pan American) and a pipeline and distribution company (Cities Service). After the parties contracted to transact at an agreed-upon price, the Corporation Commission of the State of Kansas adopted a minimum-rate order that altered the price. *Pan American,* 366 U.S. at 658, 81 S.Ct. 1303. Cities Service wrote Pan American a letter stating that it would pay the higher rate, but explained that it would expect a refund if it prevailed in its legal challenge to the minimum rate order. Pan American accepted payment on these terms. After this supplemental agreement, the Federal Power Commission (the predecessor to FERC) filed an order requiring independent producers to file rate schedules, defined to include basic contracts and all supplements and amendments. *Id.* at 660, 81 S.Ct. 1303; *see Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954) (extending jurisdiction of Federal Power Commission). The original contract was filed, though the supplemental letter was not attached. After the Kansas rate-order was found invalid, *see Cities Service Gas Co. v. State Corporation Comm.,* 355 U.S. 391, 78 S.Ct. 381, 2 L.Ed.2d 355 (1958), Cities Service sued in Delaware state court to recover its overpayment, and the Court was asked to decide whether the Delaware court had jurisdiction over the action. *Pan American,* 366 U.S. at 660-61, 81 S.Ct. 1303.

According to the Court, the state court claim did not fall within the purview of exclusive federal jurisdiction, and the state properly exercised jurisdiction. The Court explained: "We are not called upon to decide the extent to

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enjoin any violation of, this Act or any rule, regulation, or order thereunder. 15 U.S.C. § 717u.

which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that [plaintiff] sues in contract or quasicontract, not the ultimate validity of its arguments, is decisive." *Pan American,* 366 U.S. at 664, 81 S.Ct. 1303. Because the complaint merely demanded recovery on alleged contracts to refund overpayment, or for restitution of unjust enrichment, the court concluded that "[n]o right is asserted under the Natural Gas Act." *Pan American,* 366 U.S. at 662-63, 81 S.Ct. 1303.

Pan American is distinguishable from the case before us. The *Pan American* court's holding is unremarkable insofar as it held that cases falling *outside* the scope of the exclusive jurisdiction provision are not subject to it. The Court gave only modest attention to whether the contract had been filed, in whole or in part, pursuant to the Federal Power Commission order. This does not surprise, given that the alleged private contract at issue – in effect, an option contract based on a future litigation event – did not implicate the federal regulatory regime. *Pan American,* 366 U.S. at 663, 81 S.Ct. 1303 ("The rights asserted by Cities Services are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas."). And, in fact, the supplemental letter bore only an attenuated connection to the filed original contract. *Id.* at 660, 81 S.Ct. 1303.[10]

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[10] As California stresses, the *Pan American* Court does state that the Natural Gas Act's exclusive jurisdiction provision is not a "generator of jurisdiction" beyond that otherwise arising under the Natural Gas Act. *Pan American,* 366 U.S. at 664, 81 S.Ct. 1303; *see* 28 U.S.C. § 1331. We feel bound, however, by *Sparta's* subsequent interpretation of

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By contrast, the tariffs here directly implicate the federal regulatory regime, were filed with FERC, and concern obligations directly and exclusively arising under regulations issued pursuant to the FPA. California's state claim represented a naked attempt to enforce these federal obligations. Accordingly, we hold, as compelled by *Sparta*, that removal jurisdiction lies over a claim to enforce obligations that squarely fall within the exclusive jurisdiction provision of the Federal Power Act. *See* 16 U.S.C. § 825p.[11]

B

California also claims that Eleventh Amendment sovereign immunity bars removal of its lawsuit to the federal courts. Though the State is a plaintiff in this action, rather than a defendant being subject to suit, California presents the novel (at least in this court) contention that principles of sovereign immunity are violated when a plaintiff state, voluntarily prosecuting a

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language substantially identical to that contained within the FPA, and its conclusion that "the rule that state law claims cannot be alchemized into federal causes of action by incidental reference has no application when relief is partially predicated on a subject matter committed exclusively to federal jurisdiction." *Sparta*, 159 F.3d at 1212-13 (internal citation omitted).

[11] Because we hold that *Sparta* controls, we do not reach the companies' other jurisdictional arguments under *ARCO Envtl. Remediation v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir.2000), and related cases.

claim, is forced without its consent into a federal forum by operation of the federal removal statute.[12]

1

The relationship between the Eleventh Amendment and state sovereign immunity is not as simple as it may sound.

While our approach to constitutional interpretation ordinarily requires us to begin with the text of the pertinent provision, the Supreme Court has emphasized that "the sovereign immunity reflected in (rather than created by) the Eleventh Amendment transcends the narrow text of the Amendment itself." *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 688, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (describing the "whole point" of the Supreme Court's decision in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890)). Consistent with this conception, the Court has repeatedly recognized sovereign immunity outside the literal text of the Eleventh Amendment. *See, e.g., Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (holding state immune from suit brought in state court); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding state immune from suit involving a federal question); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) (holding state immune from suit brought by its own citizens). Thus the Supreme Court has "understood the Eleventh Amendment to stand

[12] We review de novo a party's claimed immunity under the Eleventh Amendment. *California ex rel. Cal. Dep't of Toxic Substance Control v. Campbell*, 138 F.3d 784, 786 (9th Cir.1998).

not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe,* 517 U.S. at 54, 116 S.Ct. 1114(quoting *Blatchford v. Native Vill. of Noatak,* 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)). This presupposition is that sovereign immunity pre-existed the Amendment; accordingly, "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden,* 527 U.S. at 713, 119 S.Ct. 2240. Indeed, as we have often been reminded, *see Alden,* 527 U.S. at 722, 119 S.Ct. 2240; *Hans,* 134 U.S. at 11, 10 S.Ct. 504, the Amendment's passage represented not the enshrinement of new doctrine but rather correction of the Supreme Court's misstep in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), which occasioned a nationwide "shock of surprise" and led swiftly to the Eleventh Amendment's ratification. *See Alden,* 527 U.S. at 722, 119 S.Ct. 2240; *College Sav. Bank,* 527 U.S. at 669, 119 S.Ct. 2219 ("Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union."); *Hans,* 134 U.S. at 11, 10 S.Ct. 504. Thus, despite the language of the Eleventh Amendment, we have long understood that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden,* 527 U.S. at 713, 119 S.Ct. 2240.

2

Cognizant that the Eleventh Amendment can only be understood in this context, we turn to its language, recognizing that while but a reflection of underlying principle, *see College Sav. Bank,* 527 U.S. at 688, 119 S.Ct. 2219, it can nonetheless prove helpful in answering the question before us. That Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. Indisputably, the Amendment limits the reach of federal judicial power to suits "commenced or prosecuted *against* one of the United States." *Id.* (emphasis added). It plainly protects states from being haled into federal courts *as defendants.* The State nevertheless urges that sovereign immunity extends even more broadly to litigation commenced *by* states – as *plaintiffs,* not defendants – when such suits are removed to federal court without the plaintiff state's consent. California's argument, in effect, is that involuntary removal is the constitutional equivalent of bringing or commencing a suit against it, or that sovereign immunity otherwise bars the same action.

a

While we have not previously explored the intersection of state sovereign immunity and removal jurisdiction when the state is a plaintiff, the Supreme Court and the constitutional framers have set down ample guideposts to shepherd our analysis. Fewer than 30 years after the

Eleventh Amendment's ratification in 1795, the Court decided *Cohens v. Virginia,* 19 U.S. (6 Wheat) 264, 407, 5 L.Ed. 257 (1821), which posed the question whether certain individuals, who had been convicted in Virginia state court for selling District of Columbia lottery tickets in violation of Virginia state law, could pursue a writ of error in the Supreme Court to assert a theory that the Supremacy Clause barred any prosecution because the lottery had been authorized by Congress. Virginia urged that it was being sued without its consent and sought to invoke the protections of Eleventh Amendment sovereign immunity. In addressing Virginia's Eleventh Amendment claim, Chief Justice Marshall explored what it means to commence or to prosecute a suit:

> To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance. *Whatever may be the stages of its progress, the actor is still the same.*

Id. at 408 (emphasis added). While observing that the judicial power does not "extend to any suit which may be commenced 8853 [or prosecuted] *against* a State by the citizen of another State," *id.* (emphasis added), the Court held explicitly that the amendment does not reach suits initiated by States. *Id.* at 407 ("The amendment, therefore, extended to suits commenced or prosecuted by individuals, *but not to those brought by States.*" (emphasis added)).

This applied even though Virginia initiated its suit in state court. *Id.* at 409 ("If a suit, brought in one Court, and carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State."). The Supreme Court, accordingly, rejected the state's claim of sovereign immunity:

> [T]he defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

Id. at 412.

While addressing the question of appellate jurisdiction, *Cohens* counsels strongly that removal does not constitute the commencement or prosecution of a suit. California argues, however, that *Cohens* not only involved the dissimilar circumstances of writ jurisdiction, rather than the involuntary removal provisions not yet enacted, *but see* Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 3721, at 289(3d ed.1998) (noting existence of limited removal provisions since the Judiciary Act of 1789, 1 Stat. 73, 79-80 (1789)), but also predated a more expansive conception of the Eleventh Amendment, particularly that inaugurated by *Hans* in 1890.

Subsequent Eleventh Amendment jurisprudence, however, does little to disturb the principle enunciated by *Cohens* that plaintiff states may not invoke the Amendment. In *Ames v. Kansas,* 111 U.S. 449, 4 S.Ct. 437, 28

L.Ed. 482 (1884), addressing the "arising under" removal provision of the Act of March 3, 1875, *see* 18 Stat. 470, 470-71, the Court considered "the question whether a suit brought by a State in one of its own courts, against a corporation amenable to its own process, to try the right of the corporation to exercise corporate powers within the territorial limits of the State, can be removed to the Circuit Court of the United States. . . ." *Ames,* 111 U.S. at 462, 4 S.Ct. 437. While it made only a brief explicit mention of the Eleventh Amendment, *see id.* at 466, 4 S.Ct. 437, the *Ames* Court addressed a similar argument to that offered by the State here:

> The [] question we have to consider is, therefore, whether suits cognizable in the courts of the United States on account of the nature of the controversy, and which need not be brought originally in the Supreme Court, may now be brought in or removed to the Circuit Courts without regard to the character of the parties. All admit that the act does give the requisite jurisdiction in suits where a State is not a party, so that the real question is, whether the Constitution exempts the States from its operation.

Id. at 470, 4 S.Ct. 437. Noting that "[t]he same exemption was claimed in *Cohens v. Virginia,* 6 Wheat. 294, to show that the appellate jurisdiction of this court did not extend to the review of the judgments of a State court in a suit by a State against one of its citizens," *Ames,* 111 U.S. at 470, 4 S.Ct. 437, the court rejected the state's claim. *Id.* ("[T]he argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his State, but is not entitled to the same force, when urged to prove that this court cannot inquire whether the Constitution or laws of the United States protect a citizen from a

prosecution instituted against him by a State." (quoting *Cohens,* 19 U.S. at 391, 19 U.S. 264 (Marshall, C.J.))).

While the *Ames* decision pre-dates *Hans, Ames* was relied upon by the Supreme Court in *Illinois v. Milwaukee,* 406 U.S. 91, 100-01, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). In that matter, the relevant question was whether the federal district court had jurisdiction under 28 U.S.C. § 1331(a) to entertain suit by the State of Illinois against certain non-state political subdivisions in Wisconsin. *Id.* at 98-101, 92 S.Ct. 1385. Though *Ames's* sovereign immunity analysis was not necessary to the Court's holding in *Illinois,* the court betrayed no hint that *Ames* had fallen into disfavor:

> As respects the power of a State to bring an action under § 1331(a), *Ames v. Kansas,* 111 U.S. 449, 470-472, 4 S.Ct. 437, 28 L.Ed. 482, is controlling. There Kansas had sued a number of corporations in its own courts and, since federal rights were involved, the defendants had the cases removed to the federal court. Kansas resisted, saying that the federal court lacked jurisdiction because of Art. III, § 2, cl. 2, of the Constitution, which gives this Court "original Jurisdiction" in "all Cases . . . in which a State shall be Party." The Court held that where a State is suing parties who are not other States, the original jurisdiction of this Court is not exclusive (*id.,* at 470, 4 S.Ct. 437) and that those suits "may now be brought in or removed to the Circuit Courts [now the District Courts] without regard to the character of the parties." *Ibid.* We adhere to that ruling.

Illinois, 406 U.S. at 100-01, 92 S.Ct. 1385 (footnotes omitted) (alterations in original).

b

Since *Ames* the Court has, on several occasions, reviewed in detail the meaning, purpose and history of sovereign immunity and the Eleventh Amendment. *See, e.g., Alden,* 527 U.S. at 715, 119 S.Ct. 2240; *Hans,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842.

This history gives little indication that sovereign immunity was ever intended to protect *plaintiff* states. Rather, it plainly understands sovereign immunity as protection from *being sued.* Even before what little debate the Eleventh Amendment stirred, the constitutional ratification debate probed in detail the meaning of Article III, section 2 of the Constitution, which some feared, by authorizing federal jurisdiction over cases "between a State and Citizens of another State," would subject states to suit by out-of-state creditors and infringe their immunity from suit.[13] *Alden,* 527 U.S. at 716, 119 S.Ct. 2240; *Hans,* 134 U.S. at 12-14, 10 S.Ct. 504. "Although the state conventions which addressed the issue of sovereign immunity in their formal ratification documents sought to

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[13] Section 2 provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, § 2.

clarify the point by constitutional amendment, they made clear that they, like Hamilton, Madison, and Marshall, understood the Constitution as drafted to preserve the States' immunity *from* private suits." *Alden,* 527 U.S. at 718, 119 S.Ct. 2240 (emphasis added). Thus, for example, the ratification documents of New York and Rhode Island both proclaimed "[t]hat the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." 1 DEBATES ON THE FEDERAL CONSTITUTION 329 (J. Elliot 2d ed. 1854) (quoted in *Alden,* 527 U.S. at 719, 119 S.Ct. 2240) (New York); 1 *id.* at 336 119 S.Ct. 2240 (quoted in *Alden,* 527 U.S. at 719, 119 S.Ct. 2240) (Maine).

The Court has, in turn, described "suits for money damages against the State[s]" as "the heart of the Eleventh Amendment's concern." *Lapides v. Bd. of Regents,* 535 U.S. 613, 620, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002); *see generally Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 102, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) ("The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." (internal citations and quotations omitted)).

Nonetheless, the State contends that removal forces a state to appear against its will in the court of another sovereign, and that sovereign immunity broadly protects "the states' litigation choices." It is long-settled, though, that "[a]lthough a State may not be sued without its consent, such immunity is a privilege which may be waived," *Gunter v. Atl. C.L.R. Co.,* 200 U.S. 273, 284, 26

S.Ct. 252, 50 L.Ed. 477 (1906), "by consenting to suit." *Coll. Sav. Bank,* 527 U.S. at 670, 119 S.Ct. 2219(citing *Clark v. Barnard,* 108 U.S. 436, 447-448, 2 S.Ct. 878, 27 L.Ed. 780(state's voluntary appearance in federal court avoids sovereign immunity inquiry)). "[H]ence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter,* 200 U.S. at 284, 26 S.Ct. 252(finding waiver where state sues in federal court). While California's hope was to avoid the federal forum, it voluntarily appeared in state court to press its claims against the companies, who predictably sought removal to what they perceived to be a more favorable forum for the adjudication of claims involving federal law. Waiver by litigation conduct "rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides,* 535 U.S. at 620, 122 S.Ct. 1640 (citing *Wis. Dep't. of Corr. v. Schacht,* 524 U.S. 381, 393, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (Kennedy, J., concurring)) (finding waiver when state is involuntarily made a party in state court and subsequently seeks removal to federal court).

3

For the foregoing reasons, we hold that a state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to a federal court of competent jurisdiction. In so holding, our conclusion is consistent with those of

our sister circuits.[14] *See Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir.2004) ("[T]he Eleventh Amendment's abrogation of federal judicial power 'over any suit . . . commenced or prosecuted against one of the United States' does not apply to suits commenced or prosecuted by a State."); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (Fed.Cir.1997) ("[T]he Eleventh Amendment applies to suits 'against' a state, not suits by a state."); *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 24 n. 6 (5th Cir.1980) ("Of course, the eleventh amendment is inapplicable where a state is a plaintiff. . . ."). Similarly, numerous district courts have adhered to this view. *See also, e.g., In re Rezulin Prods. Liab. Litig.*, 133 F.Supp.2d 272, 297 (S.D.N.Y.2001) ("[W]hile the Eleventh Amendment in some areas has been extended beyond its textual limits, this is not the case with respect to state plaintiffs."); *Vermont v. Oncor Communications, Inc.*, 166 F.R.D. 313, 321 (D.Vt.1996) ("The Eleventh Amendment does not bar removal of an action involving a federal question in which a state is the plaintiff."); *Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F.Supp.2d 1036, 1039 (D.Minn.1999) ("A number of recent cases directly refute plaintiff's argument that this case may not be removed from state to federal court.") (collecting district court cases).[15]

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[14] To the extent that California relies on *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (8th Cir.1995), for support, that case merely stands for the proposition that involuntary joinder of a State as a party to a litigation can violate Eleventh Amendment sovereign immunity.

[15] California points to two district court opinions, which we deem unpersuasive. *See California v. Steelcase, Inc.*, 792 F.Supp. 84, 86 (C.D.Cal.1992) (offering brief alternative holding that the Eleventh

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California's conception of sovereign immunity as a sword rather than a shield is unavailing.

III

Having resolved the jurisdictional issues, we now turn to the merits. The district court dismissed California's claims as barred by federal preemption and, in the alternative, the filed rate doctrine. California challenges both determinations. We address each in turn.[16]

A

"Federal preemption of state law is rooted in the Supremacy Clause, Article VI, clause 2, of the United States Constitution." *Transmission Agency of California v. Sierra Pacific Power Co.,* 295 F.3d 918, 928 (9th Cir.2002) (hereinafter "*TANC*"). "Preemption of state law 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Id.* (quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977)).

Amendment provides "immunity from being made an involuntary party to an action in federal court" and "should apply equally to the case where the state is a plaintiff in an action commenced in state court and the action is removed to federal court by the defendant."); *Moore ex rel. Mississippi v. Abbott Lab.,* 900 F.Supp. 26, 30-31 (S.D.Miss.1995) (relying entirely upon *Steelcase*).

[16] We review de novo the district court's Fed.R.Civ.P. 12(b)(6) dismissal, *Lipton v. Pathogenesis Corp.,* 284 F.3d 1027, 1035(9th Cir.2002), including its analysis of preemption, *Transmission Agency of California v. Sierra Pacific Power Co.,* 295 F.3d 918, 927-28 (9th Cir.2002), and the filed rate doctrine. *Brown v. MCI WorldCom Network Servs., Inc.,* 277 F.3d 1166, 1169 (9th Cir.2002).

In the absence of express preemption, federal law may pre-empt state claims in two ways, both of which the district court held barred California's claim. Under field preemption, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Alternatively, there is conflict preemption: "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (internal citations omitted).

The FPA applies to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b), (d). "Part II of the Federal Power Act, codified at 16 U.S.C. §§ 824-824m, delegates to the Federal Energy Commission '*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.'" *TANC,* 295 F.3d at 928 (emphasis added) (quoting *New England Power Co. v. New Hampshire,* 455 U.S. 331, 340, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982)). Indeed, "FERC's exclusive jurisdiction extends over all facilities for such transmission or sale of electric energy." *Duke Energy Trading & Mktg., L.L.C. v. Davis,* 267 F.3d 1042, 1056 (9th Cir.2001). The scope of this authority is not amenable to case-by-case analysis, but rather represents a bright-line rule:

> [Our] decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to

> be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

FPC v. Southern California Edison Co., 376 U.S. 205, 215-216, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986).

California does not contest FERC's exclusive jurisdiction over interstate wholesale power rates; rather, it urges that such authority does not extend over every aspect of the wholesale market. *See Duke Power Co. v. Federal Power Com.*, 401 F.2d 930, 935 (D.C.Cir.1968) ("[T]he Act's major emphasis is upon federal regulation of those aspects of the industry which – for reasons either legal or practical – are beyond the pale of effective state supervision."); *Ting v. AT & T*, 319 F.3d 1126, 1143 (9th Cir.2003) ("In deregulated markets, compliance with state law is the norm rather than the exception."). The FERC does not, according to California, have the requisite tools and institutional expertise of the State in policing fraudulent business practices. *Cf. Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 181, 83 Cal.Rptr.2d 548, 973 P.2d 527 (Cal.1999) (noting that the California law's "sweeping language" evidenced intent to combat "wrongful business conduct *in whatever context such activity might occur*" (internal citations omitted) (emphasis added)). To the extent that California's enforcement of its

unfair business practices law may affect rates, this effect, California asserts, is merely an indirect consequence of state regulation whose purpose is to deter fraudulent and unfair conduct, not to regulate interstate wholesale power rates.[17] In support of its view that the FPA does not preempt such state regulation, California points to 16 U.S.C. § 824a(f), which reserves for states regulatory authority to the extent that it "does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section."[18]

We cannot agree with California's theory that the State has regulatory authority over the specific tariff-governed conduct alleged in this case.[19] As we elaborate more fully

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[17] To the extent that California argues that application of its unfair competition laws merely represents an *indirect* intrusion into FERC's exclusive authority, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) ("Of course, every state statute that has some indirect effect on rates and facilities . . . is not preempted."), rather than *direct* interference with that agency's ability to enforce the tariff, we are not persuaded. *See generally N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963) ("The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas or for state regulations which would indirectly achieve the same result.") (citation omitted).

[18] 16 U.S.C. § 824e provides that upon a determination by FERC that "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e.

[19] Even if California were correct that FERC has exclusive authority over wholesale rates, but not sales, we observe without deciding that

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below, our cases specifying the nature and scope of exclusive FERC jurisdiction make clear that the interstate "transmission" or "sale" of wholesale energy pursuant to a federal tariff – not merely the "rates" – falls within FERC's exclusive jurisdiction. States do, of course, have jurisdiction over certain sales, but we have enunciated a bright-line distinction between wholesale sales, which fall within FERC's plenary jurisdiction, and retail sales, over which the states exercise jurisdiction. *See Duke Energy,* 267 F.3d at 1056 ("Retail sales of electricity and wholesale intrastate sales are within the exclusive jurisdiction of the States. . . . "); *see also id.* ("'[I]nterstate power rates filed with FERC or fixed by FERC must be given binding effect' by state authorities in areas subject to state jurisdiction, e.g., retail sales; hence, FERC approved rates preempt conflicting regulations adopted by the States.") (citing *Nantahala,* 476 U.S. at 962, 106 S.Ct. 2349). Nor, for example, has the Court limited the file rate doctrine "to rates per se or FERC orders that deal in terms of prices or volumes or purchases." *Duke Energy,* 267 F.3d at 1056(citing *Nantahala,* 476 U.S. at 966, 106 S.Ct. 2349).

Two leading cases in this area, *Duke Energy* and *TANC,* both support the view that California's lawsuit falls within the exclusive jurisdiction of FERC. In *Duke Energy,* in response to the same energy crises that form the factual background of this appeal, the Governor of California declared a state of emergency and commandeered the rights

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the distinction appears to carry little weight on these facts. According to California, by failing to adhere to their tariff obligations to provide reserve energy capacity, the companies rendered the ISO incapable of maintaining the grid's stability by maintaining supply and demand. Thus its allegation goes directly to wholesale market activities.

to certain long-term electricity contracts. *Duke Energy*, 267 F.3d at 1047. These wholesale contracts provided for liquidation of collateral in the event of non-performance, and the buyers, unable to pass through increased wholesale costs to their customers, had defaulted. Because the spot-market price of electricity had skyrocketed, the lower-price long-term contracts had substantial market value that threatened to evaporate. California sought to commandeer the long-term contracts to preserve their value. *Id.* at 1045-47; *see* Cal. Gov't Code § 8572. Because the commandeering order deprived the seller of financial security protection and assurance of payment, we concluded that "[t]he default mitigation and security provisions of the . . . rate schedule, with which [the Governor's] commandeering orders directly conflict, [fell] well within FERC's exclusive jurisdiction over interstate wholesale electricity sales." *Duke Energy*, 267 F.3d at 1058. The Governor had "encroached upon FERC's exclusive authority." *Id.*

Similarly to the case before us, in *Duke Energy* California tried to exert authority over the substantive provisions of a FERC-approved tariff. Here, the tariff governing ancillary services includes explicit remedial provisions, over which FERC similarly has exclusive authority. While in *Duke Energy* California sought to alter the tariff terms by rendering null and void the liquidation provision, here California seeks to impose judicial remedies in addition to those that FERC may impose. In each case, California

seeks to encroach upon authority entrusted exclusively to FERC by the FPA.[20]

In *TANC,* we held that the FPA preempted state law tort and property claims regarding the construction and operation of interconnections between various electricity interties in the Pacific Northwest. The Transmission Agency of Northern California ("TANC") alleged that the operation of the Alturas Intertie damaged or trespassed upon the California-Oregon Transmission Project. "FERC, however, approved the operation of the Alturas Intertie and its connection to" the intertie at issue. *TANC,* 295 F.3d at 928. In finding federal preemption, we explained that "TANC cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval." *Id.* Indeed, we reasoned that "FERC has approved the construction and operation of the Alturas Intertie, and FERC alone . . . can modify that decision, or deal with any party who operates the Alturas Intertie improperly." *Id.* at 929. Thus, *TANC,* like *Duke Energy,* stands for the proposition that remedies for breach and non-performance of FERC approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC.[21]

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[20] While California argues that its unfair competition laws extend broadly beyond mere regulation of interstate wholesale power rates, the fact that its claims are founded upon state laws of general applicability does not counsel against preemption. *See Duke Energy,* 267 F.3d at 1056-59 (holding preemption by Cal. Gov't Code § 8572, a law of general applicability).

[21] With respect to fraud, we note that we found persuasive in *TANC* the law of our sister circuits holding that procurement of a filed rate by fraud did not preclude filed rate preemption. *See TANC,* 295 F.3d at 933.

California's unfair competition claims are based on the companies' agreement to provide ancillary services, the terms of which are embodied in, and governed by, the ISO tariff, including its remedial provisions. Accordingly, we conclude that California claims are preempted because they encroach upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy.[22] *See Duke Energy,* 267 F.3d at 1057 ("[I]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.") (quoting *Miss. Power & Light Co. v. Miss. Power ex rel. Moore,* 487 U.S. 354, 377, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (Scalia, J. concurring)).[23]

B

California's challenge to the district court's alternative holding based on the filed rate doctrine presents a closely related issue, and we address it separately, if briefly, because it reinforces our conclusion. *See Entergy La., Inc. v. La. PSC,* 539 U.S. 39, 47, 123 S.Ct. 2050, 156 L.Ed.2d 34 (2003) ("When the filed rate doctrine applies to state regulators, it does so as a matter of federal preemption through the Supremacy Clause."). "At its most basic, the filed rate doctrine provides that state law, and some federal law . . . may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the

[22] We note that proceedings are ongoing before FERC regarding much of the misconduct alleged in California's claim. *See* Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, 103 F.E.R.C. ¶ 61,345 (June 25, 2003).

[23] Because we conclude that the FPA preempts the field, we do not separately address the question of conflict preemption.

federal agency in question." *TANC,* 295 F.3d at 929. The filed rate doctrine, however, is "not limited to rates per se." *Nantahala Power,* 476 U.S. at 966, 106 S.Ct. 2349.

Under the filed rate doctrine, the terms of the filed tariff "are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities'" of the contracting parties. *Evanns v. AT & T Corp.,* 229 F.3d 837, 840 (9th Cir.2000) (citing *Marcus v. AT & T Co.,* 138 F.3d 46, 56 (2d Cir.1998)); *see also Evanns,* 229 F.3d at 840 n. 9. As a result, "the filed rate doctrine bars all claims – state and federal – that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed." *County of Stanislaus v. Pacific Gas & Elec. Co.,* 114 F.3d 858, 866(9th Cir.1997); *Evanns,* 229 F.3d at 840. *See also AT & T Co. v. Central Office Tel., Inc.,* 524 U.S. 214, 227-28, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (filed rate doctrine barred state law claims for breach of contract and tortious interference with contractual relations). Thus, to the extent that California argues that the companies owe "obligations . . . *beyond those* set out in the filed tariffs . . . [such claim] is also barred by the filed rate doctrine." *Evanns,* 229 F.3d at 841.

"[T]he filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the [regulated entity] provides . . . the services covered by the tariff." *Brown v. MCI WorldCom Network Servs., Inc.,* 277 F.3d 1166, 1170 (9th Cir.2002) (internal citations omitted). To the extent that California is seeking to enforce the penalty provisions of the tariff, or

to have them expanded,[24] this conflicts with the filed rate doctrine and the exclusive authority conferred to FERC to enforce its tariff.[25]

IV

For the foregoing reasons, we affirm the district court's denial of the motions for remand, and we affirm its dismissal of the substantive claims.

AFFIRMED.

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[24] While the State concedes that the tariff prohibits double-selling of reserve capacity, it contends that restitution and disgorgement of the companies' ill-begot gains does not conflict with the filed tariff. But the tariff itself specifies the penalties to which companies are subject for violating their reserve capacity commitments.

[25] Nor does California's citation to *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (hereinafter *Arkla*), require a different result. In *Arkla*, the court found a state contract claim to be preempted under the filed rate doctrine, concluding that "to permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate." *Id.* While the *Arkla* Court did cite to *Pan American*, 366 U.S. at 656, 81 S.Ct. 1303, *see Arkla*, 453 U.S. at 582 n. 12, 101 S.Ct. 2925, as California notes, the singular reference to *Pan American* – at its core a case on jurisdiction, as discussed above, and one whose discussion of filed rate doctrine is limited – stands simply for the proposition that the filed rate doctrine does not abrogate all private contracts, such as those for refunds of charges in excess of, and not in conflict with, the filed rate. *See Arkla*, 453 U.S. at 582 n. 12, 101 S.Ct. 2925. Here, by contrast, California seeks "to alter the terms and conditions provided for in the tariff," *Central Office*, 524 U.S. at 229, 118 S.Ct. 1956 (Rehnquist, J., concurring), particularly with respect to remedies for non-compliance.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel BILL LOCKYER, ATTORNEY GENERAL, et al,

Plaintiffs,

v

MIRANT CORPORATION, et al,

Defendants.

Case Nos C-02-1787-VRW
C-02-1788-VRW
C-02-1791-VRW
C-02-1854-VRW
C-02-1899-VRW
C-02-1914-VRW
C-02-2057-VRW
C-02-2061-VRW
C-02-2207-VRW

PEOPLE OF THE STATE OF CALIFORNIA, ex rel BILL LOCKYER, ATTORNEY GENERAL, et al,

Plaintiffs,

v

RELIANT ENERGY, INC, et al,

Defendants.

ORDER

PEOPLE OF THE STATE OF CALIFORNIA, ex rel BILL LOCKYER, ATTORNEY GENERAL,

Plaintiff,

v

RELIANT ENERGY, INC, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiff,

v

DYNEGY, INC, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiff,

v

WILLIAMS ENERGY
MARKETING & TRADING
COMPANY, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiffs,

v

MIRANT CORPORATION, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiff,

v

WILLIAMS ENERGY
MARKETING & TRADING
COMPANY, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiff,

v

RELIANT ENERGY, INC, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiffs,

v

MIRANT CORPORATION, et al,

Defendants.

/

In the nine above-captioned related cases, the Attorney General of California (AG) alleges that various wholesale electricity sellers violated California's unfair business

practices law, Cal B&P Code § 17200. Seven actions assert only state law claims under § 17200. Defendants in these seven cases removed to federal court; the AG seeks remand to state court. In addition, defendants Mirant and Reliant have moved to dismiss each of the three actions against them. In addition to § 17200 claims, two of the actions also allege federal antitrust claims under § 7 of the Clayton Act, 15 USC § 18. Plaintiffs Department of Water Resources and the State of California join these two federal antitrust actions. For ease of exposition, the court refers to all plaintiffs as "the AG."

I

These cases are but some of many filed in the wake of California's attempt to restructure the transmission, generation, sale and distribution of electricity in that state and the subsequent electricity crisis in summer 2000. Beginning at least as early as 1992, California embarked on a regulatory restructuring to rely more fully on market forces as opposed to the historic cost of service regulatory regime. The restructuring effort crystalized in passage by the California legislature of Assembly Bill 1890; the vote was unanimous.

California's restructuring scheme involved the creation of two new non-governmental corporations to orchestrate the transmission and sale of electricity, organized under California law but regulated by the Federal Energy Regulatory Commission (FERC): the Independent System Operator (ISO) and the California Power Exchange (PX). In short, until it ceased operating, the PX ran auctions for sale and purchase of electricity on a day ahead and same day basis. The ISO operates the electricity grid and, to

that end, runs the spot market for electricity. During the time period in question, if consumer demand were not met by scheduled supplies into the PX or other sources, the ISO was required to procure additional electricity to serve consumers' requirements and maintain the stability of the grid. To facilitate this, the ISO purchases reserve capacity from wholesalers. This reserve capacity is left idle (or "reserved") until the ISO requires additional generation of power. If the ISO requires the additional power, it issues an order to the wholesaler to generate such power out of the reserve capacity; if not, the reserved capacity is left ungenerated.

In restructuring electricity regulation, California sought to separate the utilities' vertically-integrated generation, transmission and distribution functions with the goal of providing consumer access to competitively priced generation. As a part of this process, the state's major investor-owned utilities (IOUs) divested several power generation plants. Reliant bought five of these plants in southern California; Mirant purchased three plants in northern California.

Unfortunately, California's program did not proceed smoothly. Beginning in June 2000, wholesale electricity prices in California soared dramatically, setting off a crisis in the California energy market. Against this backdrop, the AG has initiated a series of lawsuits against wholesale electricity sellers, alleging unfair business practices. The undersigned currently has pending fifteen such cases before him. This order addresses the first nine of those cases. The cases are grouped as follows:

Antitrust cases

People v Mirant, 02-1787-VRW, and *People v Reliant*, 02-1788-VRW, allege violation of § 7 the Clayton Act, 15 USC § 18, and a corollary state law claim under California's unfair business practices statute, Cal B&P § 17200. These suits allege that Reliant and Mirant's acquisitions of power generation plants in southern and northern California, respectively, lessened competition in violation of § 7 of the Clayton Act. Reliant and Mirant account for 28% and 44% of the generation capacity of the alleged relevant markets, respectively, which the AG defines as "the [s]outhern [or northern] California market for the spot supply of wholesale electricity and reserves during higher demand." Compl (02-1788: Doc # 1] at ¶ 24. These actions were originally filed in federal court; as the claims are federal, jurisdiction is proper under 28 USC § 1331. Currently pending before the court are Reliant and Mirant's motions to dismiss these actions. See 02-1787: Doc # 14; 02-1788: Doc # 14.

Failed to File/Overcharge cases

People v Mirant, 02-2207-VRW, *People v Reliant*, 02-2061-VRW, and *People v Williams Energy Marketing & Trading Co*, 02-2057-VRW, allege two separate violations of California's unfair business practices law, Cal B&P § 17200. First, the AG alleges that these companies failed to file rate schedules as required by the Federal Power Act, 16 USC § 791a et seq (FPA). Second, the AG alleges that the companies charged unjust and unreasonable rates, as determined by the FERC, which has plenary regulatory authority over wholesale electricity sales. These cases were originally brought in California state court. Defendants removed, asserting federal question

jurisdiction over these state law claims for two related reasons: first, the claims are necessarily federal in nature and second, the claims involve significant and disputed questions of federal law. In all three cases, the AG has moved to remand. See 02-2057: Doc # 27, 02-2061: Doc # 16, 02-2207: Docs ## 19, 20. In addition, Mirant and Reliant move to dismiss the actions against them. See Mirant Br (02-2207: Doc # 14); Reliant Br (02-2061: Doc # 9).

Ancillary Services cases

People v Mirant, 02-1914-VRW, *People v Reliant*, 02-1791-VRW, *People v Dynegy, Inc*, 02-1854-VRW and *People v Williams Energy Marketing Co*, 02-1899-VRW, also allege violation of California's unfair business practices law, Cal B&P Code § 17200. In these cases, the AG asserts one cause of action under § 17200, alleging that defendants engaged in various unfair business practices with respect to the ancillary services they contracted to provide the ISO. For example, the AG alleges that defendants resold energy that they had contracted to keep in reserve. The AG seeks restitution, disgorgement of profits, statutory fines and injunctive relief. These cases were originally filed in state court; again, defendants removed, asserting essentially the same bases for removal as above. The AG has moved to remand in all of these cases. See 02-1791: Docs ## 19, 25; 02-1854: Doc # 13; 02-1899: Doc # 16; 02-1914: Doc # 13. In addition, Reliant and Mirant move to dismiss the actions against them. See Reliant Br (02-1791: Doc # 22); Mirant Br (02-1914: Doc # 10).

In total, there are seven motions to remand and six motions to dismiss before the court. Within each group of

cases, these motions are substantially identical, making five groups of motions (two sets of remand motions and three sets of motions to dismiss). In this order, the court deals only with the remand motions. Some of the defendants have stipulated to await the court's ruling on the remand motions before pleading to or otherwise responding to the complaints. Furthermore, not all cases involving the issues at bar are now before the court. While there is, of course, no question that this court has jurisdiction over the Clayton Act cases, those cases require further briefing before a decision on the motions to dismiss is appropriate. Orderly case management, therefore, suggests that at this time, the court confine itself to the remand question - whether this court has jurisdiction over the non-Clayton Act cases.

II

Removal to federal court is governed by 28 USC § 1441. Suits filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the suit. 28 USC § 1441(a). An action may be remanded to state court because the federal court lacks subject matter jurisdiction or because of a defect in the removal procedure. 28 USC § 1447(c). The removal statute is strictly construed against removal jurisdiction and any doubt must be resolved in favor of remand. See *Plute v Roadway Package System, Inc*, 141 F Supp 2d 1005, 1007 (ND Cal 2001), citing *Boggs v Lewis*, 863 F2d 662, 663 (9th Cir 1988). As the party invoking federal court jurisdiction, defendants have the burden of proving that removal was proper. See *Emrich v Touch* [sic] *Ross & Co*, 846 F2d 1190, 1195 (9th Cir 1988).

A

As an initial matter, the AG asserts that removal jurisdiction is improper because the state did not waive sovereign immunity under the Eleventh Amendment with respect to suit in federal court. Because the Eleventh Amendment serves to "avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct and Sewer v Metcalf & Eddy*, 506 US 139, 146 (1993), it does not bar suits in which the state is a plaintiff. It is well settled that "where a state is suing parties who are not in other States, the jurisdiction of this Court is not exclusive and that those suits 'may now be brought in or removed to the Circuit Courts (now the District Courts)' * * * ." *Illinois v Milwaukee*, 406 US 91, 101, (1972) (quoting *Ames v Kansas*, 111 US 449, 470 (1884)). The AG asserts that more recent Supreme Court precedent suggests a more expansive view of the Eleventh Amendment and this court should not limit its application in this case. The court disagrees. *Illinois* is binding. The Eleventh Amendment does not bar removal jurisdiction.

B

Defendants assert that original jurisdiction over these actions would have been proper under 28 USC § 1331 governing federal question jurisdiction. Federal question jurisdiction is proper if an action arising under the Constitution, laws or treaties of the United States. See 28 USC § 1331. In interpreting § 1331, courts follow the "well-pled complaint" rule, which holds that the federal claim upon which jurisdiction is based must be evident from the plaintiff's well-pled complaint; federal defenses are insufficient to confer jurisdiction. See *Franchise Tax Bd v*

Construction Laborers Vacation Trust, 463 US 1, 2 (1983). As the master of his complaint, a plaintiff may "by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar, Inc v Williams*, 482 US 386, 399 (1987). The AG's complaints in these actions allege only state law claims and therefore do not, on their face, allege federal claims. But the AG's complaints predicate violation of state law on violation of the FPA, a federal law. Defendants claim that the complaints therefore fall within the exceptions to the well-pled complaint rule. There are three exceptions to that rule:

(1) federal law completely preempts state law

(2) the claim is necessarily federal in character; or

(3) the right to relief depends on the resolution of a substantial, disputed federal question.

Arco Environmental Remediation, LLC v Dep't of Health and Environmental Quality of the State of Montana, 213 F3d 1108, 114 (9th Cir 2000). The parties agree that complete preemption, the first exception, does not apply in these cases. Defendants assert that the second and third exceptions do apply.

A claim is necessarily federal "when it falls within the express terms of a statute granting federal courts exclusive jurisdiction over the subject matter of the claim." *Hendricks v Dynegy Power Marketing, Inc*, 160 F Supp 2d 1155, 1161 (SD Cal 2001). Thus, in *Brennan v Southwest Airlines Co*, the Ninth Circuit held that an action alleging unfair business practices under § 17200 was inherently federal because it sought refund of money collected by airlines as an allegedly unauthorized federal tax. 134 F3d 1405, 1409 (9th Cir 1998). As the Internal Revenue Code

provided the exclusive remedy for a tax refund, the claim was necessarily federal in character. See id. The court relied upon the definition of a tax refund in the IRC, holding that plaintiffs' requested relief fell within that definition. In contrast, in *Arco,* the Ninth Circuit held that a suit seeking disclosure of information relating to a CERCLA cleanup was not necessarily federal because disclosure of information did not challenge a CERCLA cleanup as required under the statute at issue. Thus, in determining whether a claim is necessarily federal, courts focus on whether the federal issue falls within the statutory grant of exclusive jurisdiction.

The third exception, whether a claim raises a substantial, disputed federal question, overlaps somewhat with the second. To fall within this exception, a claim must require resolution of a substantial, disputed federal question. Thus, in *Hendricks*, the court found that remand was required because plaintiffs' Cartwright Act and § 17200 claims could succeed without reference to the FPA. 160 F Supp 2d at 1163. While the *Hendricks* plaintiffs' complaints alleged violation of the FPA as one possible theory that defendants violated the Cartwright Act and § 17200, this was not the only theory upon which plaintiffs' claims were based. See id. On that basis, the *Hendricks* court decided that the right to relief did not *require* resolution of a federal question. See id.

With these principles in mind, the court turns to the particular facts of these cases.

C

In the failed to file/overcharge cases, the AG predicates both of his § 17200 directly on violation of the FPA:

> [D]efendants have engaged in acts of unfair competition as defined in Business and Professions Code section 17200, as follows: Each and every sale or purchase of wholesale electricity by defendants for which defendants failed to file the charge, rate, price or contract reflecting the terms of the sale or purchase, as required by the Federal Power Act, FPA regulations, and FERC orders setting forth filling requirements.
>
> [D]efendants have engaged in acts of unfair competition as defined in Business and Professions Code section 17200, as follows: Each and every rate, charge, or price charged by defendants in violation of the Federal Power Act, 16 USC § 824d(a), as unfair, unreasonable, and therefore unlawful.

Compl (Doc # 02-2061:1, Exh A) at ¶¶ 49, 52; Compl (Doc # 02-2207:1, Exh A) at ¶¶ 48, 51; Compl (Doc # 02-2057:1, Exh A) at ¶¶ 41, 45. These are the only allegations upon which the AG bases his claims for relief. In his memorandum in support of remand, the AG argues that his § 17200 claims do not require resolution of a substantial, disputed federal question because a § 17200 claim may be based upon unfair or unjust practices under state law, rather than unlawful practices under federal law. Thus, the AG asserts, his § 17200 claim need not prove a violation of the FPA. This belies what the claims actually allege. The claims allege violation of the FPA as the only business practice challenged. Such claims necessarily involve resolution of a federal question: whether defendants violated the FPA.

The FPA has a very broad exclusive jurisdiction provision:

> [Federal courts] shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder.

16 USC § 825(p). The AG's claims are solely based on violation of the FPA and seek to enforce the duties created by the FPA. While the AG is not seeking a remedy available under the FPA, the AG still seeks to enforce defendants' duties under the FPA to file tariffs and charge just and reasonable rates. Federal jurisdiction over such claims is, therefore, proper. Cf *Sparta Surgical Corp v National Assoc of Sec Dealers, Inc*, 159 F3d 1209, 1212 (9th Cir 1998) (asserting federal question jurisdiction over state law claims based on exclusive jurisdiction provision of securities laws). The court therefore DENIES the AG's motions to remand in these cases (02-2057: Doc # 27, 02-2061: Doc # 16, 02-2207: Does ## 19, 20).

D

The remand question in the ancillary services cases is less straightforward. The AG in these cases alleges violation of § 17200 based on conversion of reserved capacity that the ISO rightfully owned, either by generating electricity from that capacity instead of holding it in reserve or by failing to provide electricity from that capacity when requested by the ISO. The complaints also allege that defendants submitted bids for reserve capacity that they did not intend to honor, collected payments for reserve capacity that defendants did not provide and violated contracts with the ISO. See Compl (02-1791: Doc # 1, Exh

A) at ¶¶ 65-66; Compl (02-1854: Doc # 1, Exh 1) at ¶¶ 64-65; Compl (02-1899: Doc # 1, Exh 1) at ¶¶ 58-59; Compl (02-1914: Doc # 1, Exh A) at ¶¶ 61-62.

The AG contends that such claims do not necessarily require determination that defendants violated the FPA, analogizing to *Pan American Petroleum Corp v Superior Court of Delaware*, 366 US 656, 662 (1960), a case decided under the Natural Gas Act, 15 USC § 717 et seq. In *Pan American,* the Supreme Court determined that breach of contract claims based on natural gas contracts did not create federal jurisdiction because "the rights asserted by [plaintiffs] are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." Id at 663.

The claims at issue in *Pan American* were breach of contract claims that did not arise under the Natural Gas Act. As the claims simply demanded recovery on the contracts to refund overpayment, they arose solely out of the contracts between the parties. In contrast, here the AG asserts liability based on defendants' violation of the ISO tariff. Because it is adopted by FERC as a federal regulation, the ISO tariff is more than a contract between private parties; it is federal law. As the AG's claims are based on violation of the ISO tariff, they are based on violation of federal law. *Pan American* is simply inapplicable.

The AG also relies on the recent district court decision in *Hendricks* which, as noted previously, involved claims under California's "little antitrust" statute, the Cartwright Act, Cal B&P Code § 16600 et seq. Defendants in *Hendricks* contended that the FPA completely preempted

plaintiffs' claims, a contention defendants here do not advance. The *Hendricks* court properly rejected that contention because the exclusive jurisdiction provision of the FPA only means that federal preemption is a defense to any FPA claims brought in state court. To conclude otherwise, the court said, would improperly base federal jurisdiction upon the concept of preemption itself; preemption does not itself supply the ground for federal jurisdiction.

Remand in *Hendricks* was granted because the court concluded that plaintiffs there could establish a violation of the Cartwright Act without reference to the standards established in the FPA. A conspiracy and illegal acts done pursuant thereto with the purpose of restraining trade and damage furnish the gravamen of a Cartwright Act violation. In *Hendricks*, some of the illegal acts upon which the Cartwright Act and § 17200 claims were predicated did not require proof of a federal violation. There was, therefore, an independent state law basis for the § 17200 claims alleged in that case and these claims did not necessarily entail application of the FPA or other federal law.

This is not the case with the violation of § 17200 alleged here. The conduct the AG would here condemn is expressly governed by the ISO tariffs that are within the exclusive purview of the FERC and subject to exclusive federal jurisdiction. The unfair, unlawful and fraudulent conduct alleged in the complaints describes conduct governed by the FERC regulations and federal law: bidding to provide emergency capacity with no intention of providing the services; generating electricity from reserve capacity committed to the ISO; failing to generate electricity from reserve capacity committed to the ISO when

requested; and collecting payment for services not rendered. There is no independent state law claim. The AG's claims are necessarily federal in scope. Federal jurisdiction over such claims is, therefore, proper.

As the court finds that federal jurisdiction is proper, the court DENIES the AG's motions to remand (02-1791: Docs ## 19, 25, 02-1854: Doc # 13, 02-1899: Doc # 16, 02-1914: Doc # 13).

III

In summary, the court DENIES the motions to remand in the ancillary services cases (02-1791: Docs ## 19, 25, 02-1854: Doc # 13, 02-1899: Doc # 16, 02-1914: Doc # 13) and the failed to file/overcharge cases (02-2057: Doc # 27, 02-2061: Doc # 16, 02-2207: Docs ## 19, 20).

As mentioned above, the court declines to rule on the pending motions to dismiss at this time. In the cases involving Williams Energy and Dynegy, 02-1854-VRW, 02-1899-VRW and 02-2057-VRW, defendants have indicated that they will file motions to dismiss within 15 days of this order. To facilitate orderly management of these cases, the court finds it appropriate to schedule a hearing date for these motions to dismiss. In addition, the court shall hear any further argument the parties wish to make on the motions to dismiss currently pending before the court. Accordingly, the court hereby schedules a motions hearing date of September 26, 2002, at 2pm. All further pleadings relating to these motions must be served and filed in accordance with Civil LR 7. A further case management conference shall follow the hearing.

IT IS SO ORDERED.

/s/
VAUGHN R WALKER
United States District Judge

266 F.Supp.2d 1046

United States District Court,
N.D. California.

People of the State of CALIFORNIA, ex rel
Bill LOCKYER, Attorney General, et al, Plaintiffs,

v.

MIRANT CORPORATION, et al, Defendants.
People of the State Of California, ex rel
Bill Lockyer, Attorney General, et al, Plaintiffs,

v.

Reliant Energy, Inc., et al, Defendants.
People of the State Of California, ex rel
Bill Lockyer, Attorney General, Plaintiff,

v.

Reliant Energy, Inc., et al, Defendants.
People of the State of California, ex rel
Bill Lockyer, Attorney General,
Plaintiff,

v.

Dynegy, Inc, et al, Defendants.
People Of The State Of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

Mirant Corporation, et al, Defendants.
People of the State Of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

Coral Power, LLC, Defendant.
People Of The State Of California, ex rel
Bill Lockyer, Attorney
General, Plaintiffs,

v.

Puget Sound Energy, Inc, Defendant.
People of the State Of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

Transalta Energy Marketing (California), Inc, et al,
Defendants.
People of the State Of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

Tucson Electric Power Company, Defendant.
People of the State of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

Idaho Power Company, Defendant.
People of the State of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

Merrill Lynch Capital Services, Inc, et al, Defendants.
People of the State Of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

BP Energy Company, Defendant.
People of the State of California, ex rel
Bill Lockyer, Attorney General,
Plaintiffs,

v.

Portland General Electric Company, Defendant.

Nos. C-02-1787-VRW, C-02-1788-VRW, C-02-1791-VRW, C-02-1854-VRW, C-02-1914-VRW, C-02-2061-VRW, C-02-207-VRW, C-02-2400-VRW, C-02-3036-VRW, C-02-3040-VRW, C-02-3041-VRW, C-02-3042-VRW, C-02-3127-VRW, C-02-3311-VRW, C-02-3318-VRW.

March 25, 2003.

John A. Sturgeon, Robert P. Pongetti, White & Case LLP, Los Angeles, CA, Robert B. Pringle, Thelen Reid & Priest LLP, San Francisco, CA, for Defendant.

Harvey Y. Morris, Public Utilities Commission of CA, San Francisco, CA, for Loretta Lynch.

ORDER.

WALKER, District Judge.

Motions to dismiss and to remand in the above-captioned cases are currently pending before the undersigned. In these related cases, the Attorney General of California (AG) alleges violation of California's unfair business practices law, Cal B & P Code § 17200, by a number of wholesale electricity suppliers. Two of the actions also allege federal antitrust claims under § 7 of the Clayton Act, 15 USC § 18. Plaintiffs Department of Water

Resources and the State of California join these two federal antitrust actions. For ease of exposition, the court refers to all plaintiffs as "the AG."

The remaining fifteen actions assert only state law claims under § 17200. Defendants in these cases removed the actions to federal court. On August 6, 2002, the court denied the AG's motions to remand in five of these actions (Case Nos 02-1791, 02-1854, 02-1914-VRW, 02-2061-VRW, 02-2207-VRW). Eight additional cases alleging identical causes of action under § 17200 were removed to this court and related to the other pending cases but not in time for motions to remand to be noticed and heard on July 31, 2002, with the aforementioned cases (Case Nos 02-2400-VRW, 02-3036-VRW, 02-3040-VRW, 02- 3041-VRW, 02-3042-VRW, 02-3127-VRW, 02-3311-VRW, 02-3318-VRW). Defendants in all these actions, except for BP Energy (Case No 02-3311-VRW), move to dismiss or, alternatively, to stay these proceedings pending further action by the Federal Energy Regulatory Commission (FERC).

I

Because the factual background of these cases is discussed in the court's August 6, 2002, order, the court will not repeat those facts here, except to note that the related cases were classified into three categories:

> (1) Antitrust cases (2 cases). *People v. Mirant,* 02-1787-VRW, and *People v. Reliant,* 02-1788-VRW, allege violation of § 7 of the Clayton Act, 15 USC § 18, and a corollary state law claim under California's unfair business practices statute, Cal B & P § 17200.

(2) Failed to File/Overcharge cases (10 cases). *People v. Reliant,* 02-2061- VRW, *People v. Mirant,* 02-2207-VRW, *People v. Coral,* 02-2400-VRW, *People v. Puget Sound,* 02-3036-VRW, *People v. Transalta,* 02-3040-VRW, *People v. Tucson Electric,* 02-3041-VRW, *People v. Idaho Power,* 02-3042-VRW, *People v. Merrill Lynch Capital,* 02-3127-VRW, *People v. BP Energy,* 02-3311-VRW, and *People v. Portland General,* 02-3318-VRW, allege two separate violations of California's unfair business practices law, Cal B & P § 17200. First, the AG alleges that these companies failed to file rate schedules as required by the Federal Power Act (FPA), 16 USC § 824 et seq. Second, the AG alleges that the companies charged unjust and unreasonable rates, as determined by FERC, which has plenary regulatory authority over wholesale electricity sales.

(3) Ancillary services cases (3 cases). *People v. Reliant,* 02-1791-VRW, *People v. Dynegy,* 02-1854-VRW, *People v. Mirant,* 02-1914-VRW, assert one cause of action under Cal B & P § 17200, alleging that defendants engaged in various unfair business practices with respect to the ancillary services they contracted to provide the ISO, whose operations are governed by a tariff on file with and approved by FERC.

The court's August 6, 2002, order addressed the AG's motions to remand, which were filed in all the removed cases. As a matter of prudent case management, the court declined to rule on the motions to dismiss at that time to allow other nearly identical cases in the process of being removed and related to achieve procedural parity with the earlier cases. Defendants in these cases were to file motions to dismiss, if they had not done so already, so that the matter could be heard on September 26, 2002.

This order addresses the (1) motions to remand currently pending in eight of the cases that were not related in time to be heard with the other remand motions on July 31, 2002, and (2) the motions to dismiss currently pending in all of the cases.

II

As a preliminary matter, the court considers its jurisdiction to proceed as to defendant NRG Energy, Inc (NRG) in *People v. Dynegy, Inc,* Case No 02-1854-VRW, one of the ancillary services cases. On December 13, 2002, NRG notified the court that bankruptcy proceedings were commenced against it in United States Bankruptcy Court, District of Minnesota. See Notice of Bankruptcy Filing (02-1854: Doc # 50). NRG contends that, as a result of the bankruptcy proceeding, these proceedings against it are automatically stayed, pursuant to 11 USC § 362(a)(1). *Id.*

The AG, in opposition, contends that the action with respect to NRG Energy, Inc is not automatically stayed because the case falls within the scope of 11 USC § 362(b)(4), which exempts actions or proceedings "by a governmental unit * * * to enforce such governmental unit's * * * police and regulatory power." See Pl Opp (Doc # 51). The court agrees. In *In re First Alliance Mortgage Co.,* 263 B.R. 99, 108-09 (9th Cir.BAP 2001), the Bankruptcy Appellate Panel of the Ninth Circuit held that an action seeking civil penalties, commenced by a state under its consumer protection laws, fell within the narrow scope of § 362(b)(4)'s exceptions to an automatic stay. In particular, the Bankruptcy Appellate Panel found that a suit seeking civil penalties for fraudulent business practices was not pursued "*solely* to advance a pecuniary interest of the

governmental unit." Id at 107. Instead, the suit was meant to "effectuate public policy" as opposed to "adjudicate private rights" which might otherwise be at issue in bankruptcy proceedings. Id at 108. Because the suit fell within the scope of § 362(b)(4)'s exception, "which is to prevent the bankruptcy court from becoming a haven for wrongdoers," id at 109 (citing *In re Berg*, 230 F.3d 1165, 1167 (9th Cir.2000)), the Bankruptcy Appellate Panel reversed the bankruptcy court's stay of proceedings.

Similarly, in the instant case, the AG seeks to enforce its unfair competition laws on behalf of the public by way of civil penalties. The AG does not seek restitution or other private forms of relief that might create a conflict between bankruptcy and other proceedings that would necessitate a stay. *First Alliance Mortgage Company*, 263 B.R. at 108-09. Hence, the court finds that the bankruptcy proceedings against NRG in Minnesota district court do not stay these proceedings against NRG.

III

Motions to remand are currently pending in eight cases, all of which are failure to file/overcharge cases, as described above. These motions are substantively identical to the motions to remand considered and denied by the court in its August 6, 2002, order. The parties raise no new material arguments in these more recent motions. The court therefore relies on the reasoning and analysis contained in its August 6, 2002, order and DENIES the AG's motions to remand in these cases (02-2400: Doc # 13; 02-3036: Doc # 16; 02-3040: Doc # 26; 02-3041: Docs 16,34; 02-3042: Doc # 25; 02-3127: Docs 15,16; 02-3311: Docs 12,14; 02-3318: Docs 9,21).

IV

The court now turns to the motions to dismiss. By written order dated September 3, 2002, pursuant to the procedure described by the Ninth Circuit in *Chuman v. Wright,* 960 F.2d 104 (9th Cir.1992), the court certified that the AG's pending appeal of the court's denial of remand cases was "frivolous". 9/3/02 Order (e g, 02-1791: Doc # 78). Consequently, notwithstanding the AG's pending appeals of the court's denial of remand, the court in these cases nevertheless retains jurisdiction to proceed. *Chuman,* 960 F.2d at 105.

The AG, on March 19, 2003, filed a "memorandum in opposition" to defendants' notice regarding the pendency of these submitted motions in *People v. Reliant,* Case No 02-1791-VRW. The AG asserts that because the Ninth Circuit, the day before, denied defendants' motion to dismiss for lack of jurisdiction without prejudice and referred their appeals to a merits panel, this court "has been divested of jurisdiction". See Pl Mem (02-1791: Doc # 87), at 2.

The AG is incorrect. While the Ninth Circuit undoubtedly possesses jurisdiction to consider the AG's appeal under the collateral order doctrine, this court may nevertheless proceed during the pendency of the appeal because it has already certified the appeal's frivolousness in writing, pursuant to a procedure adopted by the Ninth Circuit in *Chuman,* 960 F.2d at 105 (9th Cir.1992). See 9/3/02 Order (02-1791: Doc # 78). As explained previously, frivolous appeals can "significantly disrupt and delay trial court proceedings" and, in so doing, may "injure the legitimate interests of other litigants and the judicial system." *Apostol v. Gallion,* 870 F.2d 1335, 1338 (7th Cir.1989). By certifying in writing that the AG's appeal is

frivolous, the court is able to retain jurisdiction pending appeal. See *Chuman,* 960 F.2d at 105. Moreover, the Ninth Circuit, by order dated December 31, 2002, denied the AG's emergency motion for a stay of this court's proceedings pending appeal. See 12/31/02 Ninth Circuit Order (02-1791: Doc # 85). There being no question of the court's jurisdiction to proceed, the court considers the merits of defendants' pending motions to dismiss.

In a FRCP 12(b)(6) motion, all material allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff. See *In re Silicon Graphics Inc. Sec. Lit.,* 183 F.3d 970, 980 n. 10 (9th Cir.1999). Judicial notice of documents referenced in the complaint is also appropriate. See *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir.1994).

Dismissal is appropriate if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). When a complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir.1986).

V

The court first considers the AG's federal claims in the antitrust cases. In these cases, the AG alleges that Reliant and Mirant acquired significant power generation holdings in violation of § 7 of the Clayton Act. The AG alleges that

through these acquisitions, defendants obtained significant market power which they then used to manipulate prices during periods of higher demand.

A

As an initial matter, the AG objects to the court taking judicial notice of the content of various public documents in the federal antitrust cases. See Pl Objs (02-1787: Doc # 18); Pl Objs (02-1788: Doc # 21). The AG does not object to the court taking judicial notice of the existence of the documents, for example, the fact that the AG filed a complaint with FERC, see Def RJN (02-1787: Doc # 14, Exh 3) at Exh 7, or the fact that FERC issued various rulings pertinent to these actions, see *id.* at Exh 1. Instead, the AG objects to defendants' request that the court take judicial notice of "the information contained" in the documents. See *id.* at 1. Judicial notice of these documents is appropriate as they are a part of the public record. In taking judicial notice of these documents, the court does not adopt their factual findings or holdings; it simply acknowledges their existence and contents. Many of the factual findings in these documents are disputed by the parties. On a motion to dismiss, the court assumes that the plaintiff's version of events is correct. See *In re Silicon Graphics,* 183 F.3d at 980 n. 10. And the court does that here.

In addition, the AG objects to Mirant's inclusion of Exhibit 4, which Mirant terms the final environmental impact statement. In its request for judicial notice, Mirant does not describe how this environmental impact statement is part of the public record. Mirant appears to argue that the statement is part of the public record at FERC,

but does not so state directly. In addition, the document itself is labeled "draft environmental impact report," undermining Mirant's assertion that the document is "final" and not subject to reasonable dispute. As Mirant has failed to authenticate this document properly, the court declines to take judicial notice of Exhibit 4. Having disposed of the AG's evidentiary objections, the court turns to the merits of defendants' motions to dismiss.

B

Defendants argue that the acquisitions in question could not, as a matter of law, lessen competition, because the acquisitions were a part of the deregulation of the electricity market in California; before the acquisitions in question, there was no competition. In the alternative, defendants argue that the AG has failed properly to allege the relevant market for purposes of his antitrust claims, that the state action doctrine provides immunity and that the AG's claims are preempted by the filed rate doctrine. The court considers these arguments in turn.

1

Section 7 of the Clayton Act makes unlawful an acquisition "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly." 15 USC § 18. Defendants argue that their acquisitions moved the electricity market away from monopoly and, therefore, could not have lessened competition or tended to create a monopoly. In essence, defendants urge the court to hold that acquisitions undertaken in the context of an industry's deregulation cannot violate § 7 of the Clayton Act as a matter of law. Defendants rely on two cases in support of

their argument. See *Fraser v. Major League Soccer, LLC,* 284 F.3d 47 (1st Cir.2002); *SCM Corp. v. Xerox Corp.,* 645 F.2d 1195 (2d Cir.1981). These cases do not require such a result. Each of these cases involved dismissal of a § 7 claim at the summary judgment stage. In *Fraser,* the district court granted judgment against plaintiffs on their § 7 claim, stating that:

> Where there is no existing market, there can be no reduction in the level of competition. * * * Competition that does not exist cannot be decreased. The creation of the [Major Soccer League] did not reduce competition in an existing market because when the company was formed there was no active market for Division I professional soccer in the United States.

Fraser v. Major League Soccer, LLC, 97 F Supp 2d 130, 140-41 (D.Mass.2000). On appeal, the First Circuit upheld the decision, but on much narrower grounds. See *Fraser,* 284 F.3d at 71. In its decision, the First Circuit discussed possible theories under which a § 7 claim might be brought, but found that these theories were incompatible with the jury's determination of other issues in the case. See *id.* at 70-71.

SCM Corp is similarly distinguishable. In that case, the Seventh Circuit held that acquisitions of patent rights could not support a § 7 claim. The court relied upon the specific monopoly power that a patentee enjoys as well as a determination that there was no market for the invention at issue before the acquisition.

In addition, here, unlike *SCM Corp* and *Fraser,* before the acquisition there was a market for wholesale

electricity; while PG & E was the only market participant in California, the market nonetheless existed.

The court has found no case discussing the potential application of § 7 in the context of deregulation or specifically how acquisition and continued ownership in a newly deregulated industry are to be evaluated for their impact on competition. The court is reluctant to hold, without any factual inquiry, that an acquisition in the process of deregulation cannot lessen competition.

It is, of course, correct that before deregulation, the market in which PG & E operated was not a "competitive" one in the usual sense of that term. As a company operating in a highly regulated industry, PG & E could not exercise market power before deregulation. The highly regulated nature of the prior market should inform the court's determination of the relative competitive forces in the markets at issue here, but that determination should not be made in the factual vacuum of the present record. Cf. *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir.1989) (explaining that courts should focus on commercial realities and directly on a firm's ability to control price or exclude competition); *United States v. Marine Bancorporation,* 418 U.S. 602, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (stating that the regulated nature of the banking industry was relevant to a § 7 determination). A more complete factual record is necessary before the court should attempt to determine whether a § 7 claim may be stated here.

In addition, the AG relies upon *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975), which allows suit under § 7 "even if there was clearly no violation – no realistic threat of

restraint of commerce or creation of a monopoly – at the time of the initial acts of acquisition." *Id.* at 241, 95 S.Ct. 926. The AG cites several cases in which continued holding of an asset can be a violation of § 7. Defendants assert that these cases all involve specific anticompetitive activity, such as the creation of barriers to entry or predatory pricing. The court agrees that the AG must allege and prove more than simply that defendants' made the acquisitions at issue, but finds that the AG has met this burden.

The AG alleges that defendants charged 100% to 200% more than the price they could have charged had the holdings been diversified. See Compl (02-1787: Doc # 1) at ¶ 36; Compl (02-1788: Doc # 1) at ¶ 41. Defendants did this by exploiting their market power. See Compl (02-1787: Doc # 1) at ¶ 35; Compl. (02-1788: Doc # 1) at ¶ 40. These allegations amount to an allegation that defendants had and used market power to control prices. This is sufficient for a § 7 claim based on continued holding of the assets at issue. Monopoly power is the power to exclude competition or control prices. See *United States v. Syufy Enterprises,* 903 F.2d 659, 666 (9th Cir.1990). Allegations of the ability to control prices, therefore, suffice to allege that an acquisition tends toward monopoly.

The AG also alleges, in a conclusory fashion, that defendants are more likely to coordinate pricing, production and withholding of electricity with other electricity generators in the relevant market. See Compl (02-1787: Doc # 1) at ¶ 37; Compl (Doc # 02-1788: Doc # 1) at ¶ 42. The AG alleges no facts, however, which support this conclusory allegation. The allegation adds nothing to the AG's claim.

Defendants also assert that the AG has not alleged the relevant market adequately. To support his antitrust claims, the AG "must identify the relevant geographic and product markets * * * and allege facts demonstrating that Defendants' conduct has an anticompetitive effect on those markets." *Big Bear Lodging Assoc. v. Snow Summit, Inc.*, 182 F.3d 1096, 1104-05 (9th Cir.1999).

In *Mirant,* 02-1787-VRW, the relevant market is defined as: the spot supply of wholesale electricity and reserves in northern California during higher demand. See Compl (02-1787: Doc # 1) at ¶ 31. Similarly, in *Reliant,* 02-1788-VRW, the relevant market is defined as: the spot supply of wholesale electricity and reserves in southern California during higher demand. See Compl (02-1788: Doc # 1) at ¶ 36. In both cases, the AG alleges that this is the appropriate market because of the limited ability to transmit electricity into California or between northern and southern California during periods of high demand. See Compl (02-1787: Doc # 1) at ¶¶ 28-29; Compl (02-1788: Doc # 1) at ¶¶ 33-34. In addition, during periods of high demand, transmission of electricity between northern and southern California is alleged to be impossible. During these high demand periods, there is no substitute for spot electricity and reserves. See Compl (02-1787: Doc # 1) at ¶¶ 30; Compl (02- 1788: Doc # 1) at ¶¶ 35.

Contrary to defendants' assertions, *Big Bear* does not require the AG to "explain the basis" for his definition of the relevant market. See *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965) (a complaint alleging the relevant market need not show on the face of the

complaint that the market is the proper one). *Big Bear* merely requires that the alleged markets constitute "the [geographic] area of effective competition in which buyers of these products can find alternative sources of supply [and] that there are no other goods or services that are reasonably interchangeable * * * within this geographic market." 182 F.3d at 1105. This the AG has done, and this suffices for pleading purposes although it may well not be sufficient later on a motion for summary judgment.

3

Next, the court considers defendants' argument that the AG's § 7 claim is barred by the doctrine of state action. This doctrine insulates a private actor from liability under the federal antitrust statutes if the conduct at issue is a product of a state regulatory program. To be entitled to the doctrine's protection, defendants must demonstrate that (1) the challenged conduct is pursuant to a clearly articulated and affirmatively expressed state policy and (2) the state actively supervises the implementation of that policy. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

Again, the application of this doctrine in the context of deregulation is a novel question. Defendants assert that their acquisitions were expressly approved by the state regulatory agency, the CPUC, pursuant to a clearly articulated state policy to deregulate California's electricity market. Relying upon *McCaw Personal Communications, Inc. v. Pacific Telesis Group,* 645 F.Supp. 1166 (N.D.Cal. 1986), the AG asserts that the doctrine only applies when the state policy displaces competition with regulation; that

is, when the state policy fosters anti-competitive conduct. In *McCaw,* the court stated that the state action doctrine did not apply because defendant "had made no showing that the State of California, through the PUC's review of acquisitions * * * intends to displace competition." *Id.* at 1172. While this requirement is not found in the strict language of the *California Retail Liquor* test, such a requirement is implicit in its reasoning. As the Supreme Court explains, "[t]he [state action] doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 61, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). If the state policy does not conflict with the goal of the federal antitrust laws, there is no need to apply the doctrine at all.

Thus, defendants have not demonstrated that they are entitled to immunity based on the state action doctrine.

4

Finally, the court addresses defendants' argument that the AG's antitrust claims are barred by the Federal Power Act, 16 USC §§ 824 et seq, which grants FERC exclusive jurisdiction over wholesale interstate electricity rates. Defendants contend that they are immune or exempt from federal antitrust laws because Congress intended the FPA to operate exclusively in the realm of wholesale electricity price setting. Because the FPA does not contain any express intent by Congress to exempt otherwise applicable federal antitrust laws, any such exemption must be implied.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373-75, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), the Supreme Court held that the FPA's extensive regulatory framework did not generally displace federal antitrust laws. The Court reasoned that nothing in the FPA's provisions "was intended to be a substitute for, or to immunize [defendant] from, antitrust regulation * * * " 410 U.S. at 374-75, 93 S.Ct. 1022. See also *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 596, 96 S.Ct. 3110, 49 L.Ed.2d 1141 n. 35 (1976) ("[T]here can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities."). Accordingly, the FPA does not provide blanket immunity against the AG's federal antitrust claims.

But the Supreme Court has also held that antitrust claims seeking damages based on a filed rate are prohibited by the filed rate doctrine. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409, 422, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986); *Keogh v. Chicago & Northwestern R Co,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). Insofar as the AG alleges § 7 claims for damages arising out of defendants' "higher energy prices" (02-1787: Doc # 1, ¶¶ 35-36, 46, Prayer for Relief, ¶ 4; 02-1788: Doc # 1, ¶¶ 40-41, 51, Prayer for Relief, ¶ 4), those claims are barred.

The AG's reliance on *Town of Norwood v. New England Power Co.,* 202 F.3d 408 (1st Cir.2000), to rescue his damage claims is misplaced. The court in that case expressly acknowledged that "[d]irect antitrust attacks on federally regulated rates have * * * been limited by the filed rate doctrine." *Id.* at 422. The passage quoted by the AG does not undermine the applicability of the filed rate doctrine to antitrust damages claims, and in light of the

Supreme Court's ruling in *Square D,* the court declines to find otherwise.

While the court concludes that the filed rate doctrine bars the AG's claims for damages, that finding does not compel the same result for the AG's injunctive claims for divestiture of the power plants at issue. See *Town of Norwood,* 202 F.3d at 422-23 (explaining that "mergers or sales of assets by federally regulated utilities have been left open to antitrust challenge even though the resulting rates were subject to federal regulation and even though the merger or sale had been explicitly approved by the regulator"). As the Supreme Court explained in *Square D*:

> *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. Such a holding is far different from the creation of an antitrust immunity * * * .

476 U.S. at 422, 106 S.Ct. 1922. Hence, court-ordered divestiture of the assets in question would not offend the filed rate doctrine as it does not "usurp[ ] a function that Congress has assigned to a federal regulatory body." *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 582, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981).

County of Stanislaus v. P G & E, 114 F.3d 858 (9th Cir.1997), which defendants cite, merely affirms that damage claims under antitrust laws are subject to the filed rate doctrine. It simply does not address the propriety of injunctive relief. See *County of Stanislaus,* 114 F.3d at 860 n. 2 (noting that the parties' claims for injunctive relief are "moot" and "not before us on this appeal").

Thus, the court GRANTS in part and DENIES in part defendants' motions to dismiss in the antitrust cases (02-1787: Doc # 14, 02-1788: Doc # 14). Specifically, the court DISMISSES the AG's claims for damages under the Clayton Act but declines to dismiss his injunctive claims seeking divestiture.

VI

The court turns to the AG's state law claims contained in all of the related cases. These claims are alleged exclusively under California's unfair competition law, Cal B & P § 17200. Defendants argue that these claims are barred by the filed rate doctrine and also preempted by the Federal Power Act. In addition, if their motions to dismiss are denied, defendants also move for a stay of these cases under the primary jurisdiction doctrine, pending final resolution of FERC proceedings which address defendants' allegedly unlawful conduct.

A

"Federal preemption of state law is rooted in the Supremacy Clause, Article VI, clause 2, of the United States Constitution." *Transmission Agency of Northern California v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir.2002) (hereinafter *TANC*), amending and superseding 287 F.3d 771 (9th Cir.2002). "Preemption of state law is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (internal quotation marks omitted)).

State law must yield to federal law in three situations. First, state law may be preempted if Congress has expressly so provided. *Gade v. National Solid Wastes Mgm't Ass'n,* 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). Second, under field preemption, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) (citing *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)). Finally, under conflict preemption, "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law * * * or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) and *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Defendants contend that field and conflict preemption apply to the instant claims.

1

The FPA provides that "the business of transmitting and selling electric energy for ultimate distribution to the public" shall be subject to federal regulation. 16 USC § 824(a). The FPA is clear that the federal government enjoys exclusive regulatory authority over the wholesale transmission and sale of electricity, while states retain regulatory authority over retail sales of electricity. 16 USC §§ 824-824m; *Mississippi Power & Light Co. v. Mississippi ex rel Moore,* 487 U.S. 354, 371-72, 108 S.Ct. 2428, 101

L.Ed.2d 322 (1988). Section 824 of the FPA vests regulatory authority in FERC, which has jurisdiction over the sale of electric energy at wholesale in interstate commerce. If a rate is not just and reasonable, or if "any * * * practice, or contract affecting such rate" is not just and reasonable, it is up to FERC to address and remedy the situation in accordance with the statutory procedure defined in 16 USC § 824e.

In the FPA, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 966, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) (quoting *FPC v. Southern Cal. Edison Co.,* 376 U.S. 205, 215-16, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964)). "This was done in the Power Act by making [FERC's] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Id.* States may not regulate or interfere with "federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." *Mississippi Power & Light Co.,* 487 U.S. at 374, 108 S.Ct. 2428. "It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Id.* at 377, 108 S.Ct. 2428 (Scalia, J, concurring). Indeed, "[w]hen Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.' " *Arkansas Louisiana Gas,* 453 U.S. at 580, 101 S.Ct. 2925 (quoting *Missouri Pacific R Co. v. Stroud,* 267 U.S. 404, 408, 45 S.Ct. 243, 69 L.Ed. 683 (1925)). Accordingly, it is clear that Congress intended the FPA to preempt state law claims in the field of interstate wholesale electricity rate-setting, including practices affecting such rates.

This result is consistent with the Supreme Court's jurisprudence under the Natural Gas Act, which the Supreme Court has held to be "in all material respects substantially identical" to the FPA. Under that act, it is "well settled" that "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). Indeed, the Supreme Court's self-acknowledged and "established practice of citing interchangeably decisions interpreting the pertinent sections of the [Natural Gas Act and the Federal Power Act]" further bolsters the court's conclusion. *Arkansas Louisiana Gas,* 453 U.S. at 578 n. 7, 101 S.Ct. 2925.

In the instant cases, the AG predicates defendants' alleged violations of California's unfair competition law on (1) defendants' anti-competitive acquisition and holding of certain power plants, which drove up wholesale electricity rates (antitrust cases); (2) defendants' serial failure to file the necessary tariffs with FERC and, when they did file their rates, their overcharges thereunder (failure to file/overcharge cases); and (3) defendants' conduct in connection with their agreement to provide ancillary services, the terms of which were embodied in an ISO tariff (ancillary services cases).

Each type of allegation seeks redress for actions that fall squarely within the field preempted by the FPA. The AG's claims fail because they seek to challenge practices and contracts taken in connection with federal regulations governing the sale of wholesale electricity. As a necessary consequence, the AG attempts to transform California's unfair competition law into a means to regulate conduct that is otherwise regulated by FERC. That the AG seeks to

do so on the back of FERC does not afford an avenue to regulate matters that are wholly within FERC's exclusive domain.

The AG's claims would not merely have some undefined "indirect effect on rates," *Schneidewind,* 485 U.S. at 308, 108 S.Ct. 1145. By these claims, the AG seeks to use state law to regulate a field that Congress has set aside exclusively for federal control. "A State must * * * give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Mississippi Power & Light Co.,* 487 U.S. at 373, 108 S.Ct. 2428 (quoting *Nantahala,* 476 U.S. at 965, 106 S.Ct. 2349).

The AG's citation to *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), is unpersuasive because in that case, unlike the case at bar, the Court expressly determined that field preemption did not apply. *Id.* at 256, 104 S.Ct. 615 ("Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents."). In addition, although the Court ultimately declined to find that an award of punitive damages under state law was preempted, the Court rested its decision on its determination that the award of punitive damages for radiation injuries did not hinder accomplishment of the public safety purposes underlying federal nuclear facilities regulation. *Id.* at 256-57, 104 S.Ct. 615. By contrast, the civil penalties that the AG seeks in these actions would interfere with the exclusive authority of FERC over rate-setting.

The AG asserts that the FPA was not meant to interfere with areas traditionally regulated by the states, such

as unfair competition. In particular, the AG cites *P G & E Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). In that case, however, the Supreme Court explicitly acknowledged "the broad authority of [FERC] over the need for and pricing of electrical power transmitted in interstate commerce" and distinguished it from other "aspects of electrical generation [that] have been regulated for many years and in great detail by the states." *Id.* at 205-06, 103 S.Ct. 1713. While it may be true that unfair competition is generally an area subject to state regulation, the AG cannot credibly contend that regulation of interstate wholesale electric sales has not been an area of exclusive federal regulation since the FPA's original enactment in 1920 and that has been jealously guarded ever since.

The AG also argues that his claims are not preempted because the FPA does not "occupy the field completely." This argument, however, confuses jurisdictional preemption, as discussed by Judge Whalley in *Hendricks v. Dynegy Power Marketing, Inc.,* 160 F Supp 2d 1155, 1159 (S.D.Cal.2001), with substantive preemption, which is at issue here. Whether a federal statute "completely preempts" a field of law is pertinent to determining whether claims pled under state law nevertheless provide a federal question basis for removal jurisdiction. *Id.* at 1158. The concept of complete preemption and the cases cited by the AG thereunder are irrelevant to defendants' field and conflict preemption arguments.

2

Even if Congress did not intend the FPA to preempt the entire field of interstate wholesale power sales, the AG's claims would be barred by conflict preemption because application of California's unfair competition law would "stand[ ] as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood,* 464 U.S. at 248, 104 S.Ct. 615.

As the court's previous discussion makes clear, Congress intended to draw a "bright line" between state and federal regulation by placing the sale of wholesale electricity, including the rates and any practices affecting such rates, solely within federal control. The Ninth Circuit recently explained that the FPA "delegates to [FERC] the *exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *TANC,* 295 F.3d 918, 928 (9th Cir.2002) (emphasis in original).

Allowing the AG's claims to proceed would impermissibly thwart Congress's objective to divide regulation of electric energy into two distinct spheres and to vest exclusive jurisdiction over the wholesale component in federal hands.

B

A separate but related doctrine is that of the filed rate. At a high level of generality, the filed rate doctrine strictly prohibits deviation from the wholesale electricity rates filed with FERC. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246, 250-52, 71 S.Ct. 692, 95 L.Ed. 912 (1951) (applying the filed rate doctrine to the FPA for the first time and explaining its

necessity to give effect to Congress's intent). Courts may not effectively substitute their judgments for those of FERC concerning wholesale rate-setting. Id.

Despite its name, the filed rate doctrine is not limited solely to the rates that can be charged, but also bars claims "that concern various nonprice aspects, such as service, provisioning, and billing options" contained within a tariff filed with the agency. *ICOM Holding, Inc. v. MCI Worldcom, Inc.,* 238 F.3d 219, 222 (2d Cir.2001); see also *TANC,* 295 F.3d at 918.

In the case of state law claims, judicial application of the filed rate doctrine is "a matter of enforcing the Supremacy Clause," *Nantahala,* 476 U.S. at 963, 106 S.Ct. 2349.

> "[T]here can be no divided authority over interstate commerce, and * * * the acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R Co v. Stroud,* 267 U.S. 404, 408 [45 S.Ct. 243, 245, 69 L.Ed. 683] (1925). Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.

Nantahala, 476 U.S. at 964, 106 S.Ct. 2349 (quoting *Chicago North Western Transp. Co. v Kalo Brick & Tile Co.,* 450 U.S. 311, 318-19, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981)).

Defendants assert that assessing civil penalties based on these violations would effectively change the just and reasonable rate set by FERC. The AG requests up to $2500 per day as civil penalties for violation of the FPA, either by failing to file rates or by charging unreasonable and unjust rates. This penalty would effectively change the rate set by

FERC. See *Arkansas Louisiana Gas,* 453 U.S. at 584, 101 S.Ct. 2925 (prohibiting the award of "what amounts to a retroactive right to collect a rate in excess of the filed rate"); *Day v. AT & T,* 63 Cal.App.4th 325, 74 Cal.Rptr.2d 55, 63 (1998) ("The net effect of imposing any monetary sanction on the respondents will be to effectuate a rebate, thereby resulting in discriminatory rates.").

The AG attempts to avoid the filed rate doctrine's bar by arguing that he does not attack the reasonableness of the filed rate and that calculation of damages and fixed civil penalties will technically not require reference to an alternative court-determined rate. The AG also emphasizes that the relief sought under § 17200 is merely a civil penalty and not a refund; under § 17206(c), half of the civil penalty would go to the state's general fund, with the other half paid to the county in which judgment was entered.

The court's conclusion here, however, is guided and informed by the practical considerations discussed by the Supreme Court in *Arkansas Louisiana Gas.* In that case, the Court applied the filed rate doctrine to bar a breach of contract claim, noting that "permitting this damages award could have an unsettling effect * * * on other gas purchase transactions and would have a potential for disruption of natural gas markets." 453 U.S. at 579, 101 S.Ct. 2925 (internal citations omitted). The Court also incisively noted that any damages paid by defendants could simply be passed along to customers. *Id.* at 579, 101 S.Ct. 2925 n. 10. Here, the relief sought by the AG would impose a substantial monetary sanction on defendants, effectively changing the filed rate and unsettle the markets in ways cautioned against in *Arkansas Louisiana Gas.* Although the AG questions the continued wisdom of

the filed rate doctrine, it is indisputable that the well settled doctrine flows from congressional intent in enacting the FPA itself, to which courts have given effect through strict application of the doctrine. Those substantive provisions have not been altered by Congress, and the court declines the AG's invitation to do so here. See *P G & E v. Lynch,* 216 F Supp 2d 1016, 1039 (N.D.Cal.2002) ("[P]assing fashions in regulatory schemes of the day cannot rework the structure of the regulation established by Congress in the FPA."). The remedies sought by the AG are clearly barred by the filed rate doctrine.

The AG contends that his failure-to-file claims do not run afoul of the filed rate doctrine because, in those instances, there are no filed tariffs to attack at all. The gravamen of these claims is that defendants' failure to file was unfair and "deprived the public, power purchasers, ratepayers, and FERC of notice and information necessary to make informed decisions about rates." See, e g, Compl (02-3041: Doc # 1, Exh A), ¶ 38. On their face, these claims intrude upon FERC's exclusive authority concerning any practice affecting the filed rate. See 16 USC § 824e(a); *TANC,* 295 F.3d at 929-30 (finding "any allocation of power that directly affects rates is protected by the filed rate doctrine"); *ICOM,* supra.

Moreover, the AG's failure-to-file allegations are similar to those considered by the Supreme Court in *Montana-Dakota.* In that seminal case, the Court was confronted by allegations that "some [rate] contracts required by the [FPA] to be filed were not filed at all; that others were filed months late" and that others formed part of a fraudulent scheme. Id at 258, 71 S.Ct. 692 (Frankfurter, J, dissenting). The Court, however, nevertheless found these claims properly dismissed because

"the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." *Id.* at 251, 71 S.Ct. 692. Indeed, the Court left the task of remedying the defendants' alleged violations to FERC. *Id.* at 253, 71 S.Ct. 692.

Nor may the AG evade the filed rate doctrine by explaining that his claims are merely derivative of FERC's determinations, if any, that defendants failed to comply with federal regulations. Defendants' alleged failure to obey FERC's regulatory command undermines, rather than supports, the validity of the AG's claims. See *Mississippi Power & Light Co,* 487 U.S. at 377, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (Scalia, J. concurring) (noting "common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."); *TANC,* 295 F.3d at 932 (holding that claims falling within the ambit of exclusive federal regulation are preempted by the FPA); *Duke Energy Trading and Marketing, LLC v. Davis,* 267 F.3d 1042, 1057 (9th Cir.2001) (barring state from acting in an area "reserved for exclusive federal jurisdiction" because it "constituted an impermissible intrusion into FERC's territory").

The AG relies primarily on *Brown v. MCI WorldCom Network Svcs. Inc.,* 277 F.3d 1166 (9th Cir.2002) (hereinafter *MCI*) to support his proposition that the filed rate doctrine does not apply to his present claims. In *MCI,* a customer alleged he had been billed for phone service that was never provided. *Id.* at 1171. In that case, which dealt with the Federal Communications Act (FCA), the Ninth Circuit determined that the filed rate doctrine did not apply because the plaintiff was not challenging the tariff's terms, either directly or indirectly. The Ninth Circuit

explained that the filed rate doctrine "does not preclude courts from interpreting the provisions of a tariff and enforcing that tariff." Id at 1171-72.

But *MCI* is simply inapposite in the present context. The Ninth Circuit reasoned that the plaintiff could bring suit because application of the filed rate doctrine would have rendered meaningless provisions creating a private right of action in federal court to enforce the FCA. Id at 1172; 47 USC §§ 206-07 (creating private right of action against common carriers who violate the FCA "for the full amount of damages"). Recently, the Ninth Circuit discussed at length the changes in regulatory regimes by Congress's enactment of the Telecommunications Act of 1996, Pub L No 104-104, 100 Stat 5, in *Ting v. AT & T,* 319 F.3d 1126 (9th Cir.2003):

> Under the old [telecommunications] regime, * * * [f]ederal law * * * preempted state law. But under the competition-based regime adopted by Congress in 1996, and implemented by the FCC, state law protections are no longer excluded as they once were under the express terms of the filed rate doctrine. Congress recognized as much * * * in the 1996 Act.

Id. at 1142-43.

But, under the FPA, which Congress has not seen fit to overhaul, no such right of action exists against electric wholesalers, and the Supreme Court has foreclosed any possibility of recovery in the cases at bar insofar as the AG's claims intrude upon FERC's domain. See *Montana-Dakota,* 341 U.S. at 251, 71 S.Ct. 692 ("[T]he prescription of the statute is a standard for the Commission to apply

and, independently of Commission action, creates no right which courts may enforce.").

Moreover, the AG's attempt to analogize his ancillary services claims with those in *MCI* by arguing that defendants failed to provide contracted services is unpersuasive precisely because the relief sought by the AG would effectively alter the filed tariff. Defendants argue that the tariff at issue provides remedies for its breach and the AG cannot extend those remedies. The AG has alleged that the "ISO's operations are governed by a Tariff and Protocols on file with and approved by [FERC]." Compl (e g, 02-1914: Doc # 1, Exh A, ¶ 26). The tariff provides for the possibility that energy wholesalers would not have reserve capacity when requested. Over a series of amendments to the tariff, FERC approved different payments to wholesalers when they failed to provide reserve capacity as required by contract. *Id.*, ¶¶ 50-53. The parties disagree regarding the interpretation of these amendments and the appropriate payment for reserve capacity. This simply highlights the fact that the AG seeks a determination from this court about the appropriate rates for reserve capacity. This is barred by the filed rate doctrine. The tariff provides for monetary payments for specific services rendered; to require an additional payment would conflict with the tariff. See *Day,* 74 Cal.Rptr.2d at 63.

While the AG's claims may be "consistent" with the ISO tariff insofar as the tariff does not expressly prohibit the additional obligations the AG wishes to impose, they nevertheless seek to alter the effective terms of the filed tariff. Indeed, the AG admits that the conduct for which the AG seeks remedy is addressed by the ISO tariff itself; the AG may not indirectly assault the filed rate by these means.

The AG also contends that the filed rate doctrine does not prohibit the court from affording judicial relief from rates that were obtained through fraud or other unfair tactics. For this proposition, the AG relies primarily on a Fifth Circuit case, *Gulf States Utilities Co. v. Alabama Power Co.,* 824 F.2d 1465 (5th Cir.1987). In *Gulf States,* the Fifth Circuit held that certain claims brought by a public utility against electricity wholesalers were not barred by the filed rate doctrine. The parties in that case had entered into a long-term contract for the sale and purchase of agreed-upon quantities of electricity at specified rates, which they filed with FERC. When subsequent market conditions did not match the expectations of one of the parties, the plaintiff brought suit, alleging breach of contract. The Ninth Circuit has limited the Fifth Circuit's holding in *Gulf States;* the Ninth Circuit has stated that "the *quantity* to be purchased was not within the ambit of federal regulation," as opposed to other any other consideration or practice that might affect rates. *TANC,* 295 F.3d at 932 (emphasis added). The conduct at issue in the instant cases, on the other hand, directly concerns rate-setting and filed rates.

Because the AG's state law claims in all of the instant cases are preempted by the FPA and barred by the filed rate doctrine, the court GRANTS defendants' motions to dismiss the AG's state law claims in all of the instant cases (02-1787: Doc # 14; 02-1788: Doc # 14; 02-1791: Doc # 22; 02-1854: Doc # 33; 02-1914: Doc # 10; 02-2061: Docs 9,15,29; 02-2207: Docs 14,28; 02-2400: Docs 9,33,35; 02-3036: Doc # 6; 02-3040: Doc # 6; 02- 3041: Doc # 6; 02-3042: Doc # 6; 02-3127: Docs 11,20; 02-3318: Docs 3,22) and dismisses these claims with prejudice.

VII

In summary, the court DENIES the AG's motions to remand in the recently related cases (02-2400: Doc # 13; 02-3036: Doc # 16; 02-3040: Doc # 26; 02-3041: Docs 16,34; 02-3042: Doc # 25; 02-3127: Docs 15,16; 02- 3311: Docs 12,14; 02-3318: Docs 9,21), GRANTS in part and DENIES in part defendants' motions to dismiss in the antitrust cases (02-1787: Doc # 14; 02- 1788: Doc # 14), GRANTS defendants' motions to dismiss in the failed to file/overcharge cases, with the exception of BP Energy, which did not file a motion to dismiss, (02-2061: Docs 9,15,29; 02-2207: Docs 14,28; 02- 2400: Docs 9,33,35; 02-3036: Doc # 6; 02-3040: Doc # 6; 02-3041: Doc # 6; 02-3042: Doc # 6; 02-3127: Docs 11,20; 02-3318: Docs 3,22), and GRANTS defendants' motions to dismiss in the ancillary services cases (02- 1791: Doc # 22; 02-1854: Doc # 33; 02-1914: Doc # 10). Dismissal of these claims is with prejudice. Accordingly, the clerk is directed to close the files, terminate all pending motions and enter judgment for defendants in the following cases: *People v. Reliant,* Case No 02-1791-VRW; *People v. Dynegy,* Case No 02-1854-VRW; *People v. Mirant,* Case No 02-1914-VRW; *People v. Reliant,* Case No 02-2061-VRW; *People v. Mirant,* Case No 02- 2207-VRW; *People v. Coral,* Case No 02-2400-VRW; *People v. Puget Sound,* Case No 02-3036-VRW; *People v. Transalta Energy,* Case No 02-3040-VRW; *People v. Tucson Electric,* Case No 02-3041-VRW; *People v. Idaho Power,* Case No 02-3042-VRW; *People v. Merrill Lynch Capital,* Case No 02-3127- VRW; *People v. Portland General Electric,* Case No 02-3318-VRW; and *People v. Transcanada Power,* Case No 02-3731-VRW.

Upon entry of this order, only three cases remain pending before the court: (1) *People v. BP Energy,* Case No

02-3311-VRW, in which the parties have agreed to extend the time for BP Energy to answer or otherwise respond to the complaint until after the court ruled on the AG's motion to remand; and (2) the antitrust cases, *People v. Mirant,* Case No 02-1787-VRW, and *People v. Reliant,* Case No 02-1788-VRW, in which only the AG's Clayton Act claim for the divestiture of certain power facilities remains. A case management conference in the antitrust cases is hereby set for April 3, 2003, at 3:30pm.

As an administrative matter, the court TERMINATES as moot the motions related to the AG's prior efforts to stay defendants' motions to dismiss until the court ruled on the AG's motions to remand (02-1914: Docs 24, 39, 42; 02-2061: Docs 21, 22; 02-2207: Docs 21, 22). The court denied remand in these cases by order dated August 6, 2002.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel BILL LOCKYER, ATTORNEY GENERAL, Plaintiff, v RELIANT ENERGY, INC, et al, Defendants.	Case Nos C-02-1791-VRW C-02-1854-VRW C-02-1899-VRW C-02-1914-VRW C-02-2057-VRW C-02-2061-VRW C-02-2207-VRW
PEOPLE OF THE STATE OF CALIFORNIA, ex rel BILL LOCKYER, ATTORNEY GENERAL, Plaintiff, v DYNEGY, INC, et al, Defendants.	ORDER.
PEOPLE OF THE STATE OF CALIFORNIA, ex rel BILL LOCKYER, ATTORNEY GENERAL, Plaintiff, v WILLIAMS ENERGY MARKETING & TRADING COMPANY, et al, Defendants.	

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiffs,

v

MIRANT CORPORATION, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiff,

v

WILLIAMS ENERGY
MARKETING & TRADING
COMPANY, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiff,

v

RELIANT ENERGY, INC, et al,

Defendants.

PEOPLE OF THE STATE
OF CALIFORNIA, ex rel
BILL LOCKYER, ATTORNEY
GENERAL,

Plaintiffs,

v

MIRANT CORPORATION, et al,

Defendants.
_____/

In the above-captioned related cases and on behalf of the state, the Attorney General of California (AG) originally filed suit in state court against various wholesale electricity sellers, alleging violations of California's unfair business practices law, Cal B&P Code § 17200. Defendants in these seven cases removed the actions to federal court. On May 15, 2002, the AG moved to remand these actions. On August 6, 2002, this court denied the AG's motion. One week later, the AG filed a notice of appeal.

The AG moves the court to grant a stay, under the collateral order doctrine, of all proceedings in these cases while its appeal before the Ninth Circuit is pending. See Doc #68. Defendants oppose the stay and move the court to certify in writing that the AG's appeal is frivolous, thereby allowing this court to retain jurisdiction pending appeal. See Doc #72.

I

Under the collateral order doctrine, a denial of Eleventh Amendment immunity is immediately appealable. See *Puerto Rico Aqueduct and Sewer Auth v Metcalf & Eddy, Inc,* 506 US 139, 144 (1993). In the Ninth Circuit, if

an interlocutory claim is immediately appealable, "its filing divests the district court of jurisdiction to proceed to trial." *Chuman v Wright,* 960 F2d 104, 105 (9th Cir 1992) (citing *United States v Claiborne,* 727 F2d 842, 850 (9th Cir 1984), *cert denied,* 469 US 829 (1984)). Such appeals, however, can "significantly disrupt and delay trial court proceedings." Id. In doing so, they may "injure the legitimate interests of other litigants and the judicial system." *Apostol v Gallion,* 870 F2d 1335, 1338 (7th Cir 1989).

District courts, however, are not "helpless." Id at 1339. A notice of appeal "may be so baseless that it does not invoke appellate jurisdiction." Id. In such cases, a district court may certify in writing that an appeal is frivolous, thereby allowing it to retain jurisdiction. *Chuman,* 960 F2d at 105. "Such a power must be used with restraint * * *." *Apostol,* 870 F2d at 1339. While *Chuman* and *Apostol* dealt specifically with claims of qualified immunity, the court finds that the issues and interests involved, primarily immunity from suit, are so similar that those cases' holdings apply here, in the context of Eleventh Amendment immunity. See *Chuman,* 960 F2d at 105 (extending double jeopardy certification procedure to qualified immunity claims because of their relatedness).

II

Defendants move the court to certify that the AG's appeal is frivolous. The AG's appeal is based on his claim that Eleventh Amendment immunity applies to actions originally brought in state court and removed to federal court. In essence, the AG contends that these actions on behalf of the state are immune from otherwise applicable laws governing removal to federal court.

"An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *Wilcox v Commissioner of Internal Revenue,* 848 F2d 1007, 1009 (9th Cir 1988); see *United States v LaMere,* 951 F2d 1106, 1108 (9th Cir 1991) (finding of frivolousness based on "clear and long-standing case law").

While the Eleventh Amendment serves to "avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct,* 506 US at 146, it does not apply if a state is subjecting another party to litigation. Under the terms of the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted against* one of the United States * * *." US Const, Amend XI (emphasis added). The Supreme Court has "consistently held that an unconsenting State is immune from suits brought in federal court by her own citizens as well as by citizens of another State." *Puerto Rico,* 506 US at 144. Both the language of the Eleventh Amendment and the Supreme Court's jurisprudence clearly limit the scope of immunity solely to suits brought against a state in federal court.

Indeed, as noted in the court's August 6, 2002, Order, it is well settled that "where a state is suing parties who are not in other States, the jurisdiction of this Court is not exclusive and that those suits 'may now be brought in or removed to the Circuit Courts (now the District Courts)' * * *." *Illinois v Milwaukee,* 406 US 91, 101 (1972) (quoting *Ames v Kansas,* 111 US 449, 470 (1884)). In *Ames,* the Court addressed specifically the removability of an action commenced by a state to the federal courts. See *Ames,* 111 US at 470.

While the Ninth Circuit has not directly addressed the precise issue at bar, the Fifth Circuit has noted, "Of course, the eleventh amendment is inapplicable where a state is a plaintiff." *Huber, Hunt & Nichols, Inc v Architectural Stone Co, Inc,* 625 F2d 22, 24 n6 (5th Cir 1980). In addition, the Federal Circuit has stated, "[T]he Eleventh Amendment applies to suits 'against' a state, not suits by a state." *Regents of the Univ of Cal v Eli Lilly & Co,* 119 F3d 1559, 1564 (Fed Cir 1997), *cert denied,* 523 US 1089 (1998).

The AG contends that more recent Supreme Court decisions suggest a more expansive view of the Eleventh Amendment than in the past. The AG's position that this Supreme Court jurisprudence is moving toward an Eleventh Amendment immunity against removal of a state initiated suit is, however, clearly baseless. While recent Supreme Court decisions may have expanded the Eleventh Amendment's scope in other contexts, these decisions have left *unchanged* the principle that the amendment applies only to suits against a state. See *Federal Maritime Comm'n v South Carolina State Ports Authority,* ___ US ___, 122 S Ct 1864, 1871 (2002) (Eleventh Amendment bars Federal Maritime Commission from adjudicating private complaints against state-run port); *Alden v Maine,* 527 US 706, 714 (1999) (Eleventh Amendment bars private suits under Fair Labor Standards Act against states); *Idaho v Coeur d'Alene Tribe of Idaho,* 521 US 261 (1997) (Eleventh Amendment bars federal court action by Indian tribe against state).

No support for the AG's position can be found in the language of the amendment, any Supreme Court case or any other appellate case. The AG cites two district court

cases, neither of which were appealed, that applied sovereign immunity to removal of cases commenced by a state. See *Moore v Abbott Laboratories, Inc,* 900 F Supp 26 (SD Miss 1995); *People v Steelcase, Inc,* 792 F Supp 84 (CD Cal 1992). Neither case, however, cited or considered *Illinois* or *Ames.*

In contrast, many more district courts cases have explicitly declined to follow *Moore* or *Steelcase* and instead concluded that Eleventh Amendment immunity does not apply to removal of actions in which the state is a plaintiff. See *School Bd of the Parish of St Charles v Quala Sys, Inc,* 159 F Supp 2d 295, 297-98 (ED La 2001); *In re Rezulin Prod Liab Lit,* 133 F Supp 2d 272, 297 (SDNY 2001); *Regents of the Univ of Minn v Glaxo Wellcome, Inc,* 58 F Supp 2d 1036, 1039 (D Minn 1999); *Kansas ex rel Stovall v Home Cable Inc,* 35 F Supp 2d 783, 788-89 (D Kan 1998); *Vermont v Oncor Communications,* 166 FRD 313, 320-21 (D Vt 1996); *South Dakota State Cement Plant Comm'n v Wausau Underwriters Ins Co,* 778 F Supp 1515, 1522 (DSD 1991); see also *New York v Citibank, NA,* 537 F Supp 1192 (SDNY 1982) ("[I]t is clear that an action can be removed notwithstanding the fact that a state is a plaintiff.")

Furthermore, Judge Easterbrook wisely observed in *Apostol* that jurisdiction between the district court and the court of appeals is not a "unitary concept," *Apostol,* 870 F2d at 1337, but has many meanings and depends on practical considerations as well as formal ones. Here, there are motions to dismiss pending which, if granted, could plainly afford the AG a final judgment and an unhindered route to an appellate remedy. If those motions are denied, the AG will be able to proceed with the litigation that he initiated and, presumably, wishes to pursue. As there is no question that this court has jurisdiction over

a claim brought by a state against non-state parties, California suffers no loss of dignitary interests because its attorney general must litigate in federal court.

Hence, the court finds that the AG's appeal is contrary to clear and long-standing caselaw and practical notions of proper appellate jurisdiction. The court hereby certifies in writing that the AG's appeal, based on his claim of Eleventh Amendment immunity in actions he commenced, is frivolous. Defendants' motion for certification (Doc #72) is GRANTED. The AG's motion to stay proceedings pending appeal (Doc #68) is DENIED.

IT IS SO ORDERED.

/s/
VAUGHN R WALKER
United States District Judge

387 F.3d 966

United States Court of Appeals,
Ninth Circuit.

People of the State of CALIFORNIA, ex rel. Bill LOCKYER, Attorney General, Attorney General of the State of California, Plaintiffs-Appellants,

v.

DYNEGY, INC.; Dynegy Power Marketing, Inc.; NRG Energy, Inc.; Xcel Energy, Inc.; West Coast Power LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; El Segundo Power LLC; Long Beach Generation LLC, Defendants-Appellees.

People of the State of California, ex rel. Bill Lockyer, Attorney General of the State of California; Bill Lockyer, Attorney General, Attorney General of the State of California, Plaintiffs-Appellants,

v.

Reliant Energy, Inc.; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources, Inc.; Reliant Energy Coolwater, LLC; Reliant Energy Ellwood, LLC; Reliant Energy Etiwanda, LLC; Reliant Energy Mandalay, LLC; Reliant Energy Ormond Beach, LLC, Defendants-Appellees.

People of the State of California, ex rel. Bill Lockyer, Attorney General of the State of California; Bill Lockyer, Attorney General, Attorney General of the State of California, Plaintiffs-Appellants,

v.

Mirant Corporation; Mirant California, L.L.C.; Mirant Potrero L.L.C.; Mirant Americas Energy Marketing, L.P.; Mirant California Investments, Inc.; Mirant Americas Inc.; Southern Energy Golden States Holdings, Inc., Defendants-Appellees.

People of the State of California, ex rel. Bill Lockyer, Attorney General, Attorney General of the State of California, Plaintiff-Appellant,

v.

Reliant Energy, Inc.; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources, Inc.; Reliant Energy Coolwater, LLC; Reliant Energy Ellwood, LLC; Reliant Energy Etiwanda, LLC; Reliant Energy Mandalay, LLC; Reliant Energy Ormond Beach, LLC; Mirant Corporation; Mirant California, L.L.C.; Mirant Delta, L.L.C.; Mirant Potrero, LLC; Mirant Americas Energy Marketing, L.P.; Mirant California Investments, Inc.; Mirant Americas, Inc.; Southern Energy Golden States Holdings, Inc.; Dynegy, Inc.; Dynegy Power Marketing, Inc.; N[RG] Energy, Inc.; Xcel Energy, Inc.; West Coast Power, L.L.C.; Cabrillo Power I, L.L.C.; Cabrillo Power II LLC; El Segundo Power, L.L.C.; Long Beach Generation LLC, Defendants-Appellees.

Nos. 02-16619, 02-16625, 02-16629, 03-15588.

Argued Aug. 12, 2003.
Submitted as to all parties except NRG Energy, Inc. Oct. 27, 2003.*

Submitted as to NRG Energy, Inc. April 15, 2004.**

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* The court had deferred submission pending receipt of a bankruptcy court order granting limited relief from the automatic stay in the proceedings of Mirant Corporation and its affiliated debtors.

** At the time of submission as to the other parties, the appeal was not submitted as NRG Energy, Inc. ("NRG"), which was in bankruptcy proceedings, and whose appeal had accordingly been stayed by this court's order of May 30, 2003. The court vacated its stay on April 15, 2004, and, consistent with the parties' stipulation, deemed the case submitted as to NRG.

Filed July 6, 2004.
Amended Oct. 29, 2004.

Tamar Pachter, Deputy Attorney General, State of California, San Francisco, CA, argued the case for the appellant and was on the briefs. Attorney General Bill Lockyer, and Thomas Greene, Damon Connolly, Danette Valdez, Pamela Merchant, Paul Stein, and Laura Zuckerman, Office of the Attorney General, were also on the briefs.

Terry J. Houlihan, Bingham McCutcheon LLP, San Francisco, CA, argued the case for the appellees and was on the joint briefs of the appellees, as attorney for appellees Reliant Energy, Inc.; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources, Inc.; Reliant Energy Coolwater, Inc.; Reliant Energy Ellwood, Inc.; Reliant Energy Etiwanda, Inc.; Reliant Energy Mandalay, Inc.; and Reliant Energy Ormond Beach, Inc. Nora Cregan and Thomas S. Hixson were also on the joint briefs as attorneys for the same parties.

John M. Grenfell, Douglas R. Tribble, and Michael J. Kass, Pillsbury Winthrop LLP, San Francisco, CA, were on the joint briefs of the appellees, as attorneys for appellees Dynegy, Inc.; Dynegy Power Marketing, Inc.; West Coast Power, LLC; Cabrillo Power I, LLC; Cabrillo Power II, LLC; El Segundo Power, LLC; and Long Beach Generation, LLC.

John A. Sturgeon and Bryan A. Merryman, White & Case LLP, Los Angeles, CA, were on the joint briefs of the appellees, as attorneys for appellees Mirant Corporation; Mirant California, LLC; Mirant Delta, LLC; Mirant Potrero, LLC; Mirant Americas Energy Marketing, LP;

Mirant California Investments, Inc.; Mirant Americas, Inc.; and Southern Energy Gold States Holdings, Inc.

David T. Peterson and Theodore G. Spanos, Morgan Lewis & Brockius LLP, Los Angeles, CA, were on the joint briefs of the appellees, as attorneys for appellee Xcel Energy, Inc.

Carlton A. Varner and Timothy B. Taylor, Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, CA, were on the joint briefs of the appellees, as attorneys for appellee NRG Energy, Inc.

Attorney General Christine O. Gregoire, Seattle, Washington, and Tina E. Kondo and W. Stuart Hirschfeld, Office of the Attorney General; and Attorney General Hardy Myers, Salem, Oregon, and Robert T. Roth and Colin A. Yost, Office of the Attorney General; were on the brief of amici curiae State of Washington and State of Oregon in support of plaintiff.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. Nos. CV-02-01854-VRW, CV-02-01791-VRW, CV-02-01914-VRW, CV-02-01791-VRW, CV-02-01914-VRW, CV-02-01854-VRW.

Before HALL, O'SCANNLAIN, and LEAVY, Circuit Judges.

ORDER

The opinion filed July 6, 2004 is hereby amended as follows:

At page 8863 of the slip opinion, footnote 17, delete the parenthetical quotation and add the following two sentences at the conclusion of footnote 17 as follows:

> At issue are not state regulatory schemes for employment discrimination, workers compensation, or the like, which might indirectly and unintentionally have some possible effect on energy prices. Rather, the lawsuit seeks *directly* to enforce federal tariff obligations.

With this amendment, the panel has voted unanimously to deny appellant's petition for rehearing. Judge O'Scannlain has voted to deny the petition for rehearing en banc. Judges Hall and Leavy recommend that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

15 U.S.C. § 717u. Jurisdiction of offenses; enforcement of liabilities and duties

The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

Cal. Bus. & Prof. Code

§ 17200. Unfair competition; prohibited activities

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

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§ 17201. Person.

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

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§ 17201.5. Board within the department of consumer affairs; local consumer affairs agency

As used in this chapter:

(a) "Board within the Department of Consumer Affairs" includes any commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) "Local consumer affairs agency" means and includes any city or county body which primarily provides consumer protection services.

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§ 17202. Authority to grant specific or preventive relief

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

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§ 17203. Injunction; orders or judgments

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

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§ 17204. Actions for relief; prosecutors

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and

county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

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§ 17204.5. Actions for injunctions; prosecution by city attorney of City of San Jose; annual consent of district attorney

In addition to the persons authorized to bring an action pursuant to Section 17204, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute those actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as determined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

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§ 17205. Cumulative remedies

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

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§ 17206. Violations; penalty; actions for recovery; expenses of investigation and prosecution; disposition of proceeds from penalties

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance or by any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If brought

by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (b), the amount of such reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which

the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises which were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

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§ 17206.1. Additional penalties for violations against senior citizens or disabled persons; definitions; factors to be considered; priority of restitution

(a) In addition to any liability for a civil penalty pursuant to Section 17206, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which may be assessed and recovered in a civil action as prescribed in Section 17206.

Subject to subdivision (d), any civil penalty shall be paid as prescribed by subdivisions (b) and (c) of Section 17206.

(b) As used in this section, the following terms have the following meanings:

(1) "Senior citizen" means a person who is 65 years of age or older.

(2) "Disabled person" means any person who has a physical or mental impairment which substantially limits one or more major life activities.

(A) As used in this subdivision, "physical or mental impairment" means any of the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; muscoloskeletal;[1] special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(B) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) In determining whether to impose a civil penalty pursuant to subdivision (a) and the amount thereof, the court shall consider, in addition to any other appropriate factors, the extent to which one or more of the following factors are present:

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[1] So in chaptered copy.

(1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

(2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.

(3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

(d) Any court of competent jurisdiction hearing an action pursuant to this section may make orders and judgments as may be necessary to restore to any senior citizen or disabled person any money or property, real or personal, which may have been acquired by means of a violation of this chapter. Restitution ordered pursuant to this subdivision shall be given priority over recovery of any civil penalty designated by the court as imposed pursuant to subdivision (a), but shall not be given priority over any civil penalty imposed pursuant to subdivision (a) of Section 17206. If the court determines that full restitution cannot be made to those senior citizens or disabled persons, either at the time of judgment or by a future date

determined by the court, then restitution under this subdivision shall be made on a pro rata basis depending on the amount of loss.

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§ 17206.5. Actions brought pursuant to § 17206; prosecution by city attorney of City of San Jose; annual consent of district attorney

In addition to the persons authorized to bring an action pursuant to Section 17206, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute those actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as determined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

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§ 17207. Violation of injunction prohibiting unfair competition; civil penalty; actions to assess and recover; venue; prosecutors; expenses of investigation and prosecution

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the

harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the

penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

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§ 17208. Commencement of action; limitations; revival

Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

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§ 17209. Proceedings involving violations or construction of chapter; notice to Attorney General and county district attorney

If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any

proceeding in the Supreme Court of California, a state court of appeal, or the appellate department of a superior court, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after the commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.

Proposition 64

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the Business and Professions Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declarations of Purpose

The people of the State of California find and declare that:

(a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices.

(b) These unfair competition laws are being misused by some private attorneys who:

(1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.

(2) File lawsuits where no client has been injured in fact.

(3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

(4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

(c) Frivolous unfair competition lawsuits clog our courts and cost taxpayers. Such lawsuits cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits.

(d) It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code.

(e) It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.

(f) It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public.

(g) It is the intent of California voters in enacting this act that the Attorney General, district attorneys,

county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.

(h) It is the intent of California voters in enacting this act to require that civil penalty payments be used by the Attorney General, district attorneys, county counsels, and city attorneys to strengthen the enforcement of California's unfair competition and consumer protection laws.

SEC. 2. Section 17203 of the Business and Professions Code is amended to read:

17203. *Injunctive Relief – Court Orders*

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

SEC. 3. Section 17204 of the Business and Professions Code is amended to read:

17204. *Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys*

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of such unfair competition.*

SEC. 4. Section 17206 of the Business and Professions Code is amended to read:

17206. *Civil Penalty for Violation of Chapter*

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city

prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. *The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.*

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local

consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered *for the exclusive use by the city attorney for the enforcement of consumer protection laws.* However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

SEC. 5. Section 17535 of the Business and Professions Code is amended to read:

17535. *Obtaining Injunctive Relief*

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

SEC. 6. Section 17536 of the Business and Professions Code is amended to read:

17536. *Penalty for Violations of Chapter; Proceedings; Disposition of Proceeds*

(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer.

If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city. *The aforementioned funds shall be for the exclusive use by the Attorney General,*

district attorney, county counsel, and city attorney for the enforcement of consumer protection laws.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality which funds the local agency.

(e) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive.

SEC. 7. In the event that between July 1, 2003, and the effective date of this measure, legislation is enacted that is inconsistent with this measure, said legislation is void and repealed irrespective of the code in which it appears.

SEC. 8. In the event that this measure and another measure or measures relating to unfair competition law shall appear on the same statewide election ballot, the provisions of the other measures shall be deemed to be in conflict with this measure. In the event that this measure shall receive a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety,

and the provisions of the other measure relating to unfair competition law shall be null and void.

SEC. 9. If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Plaintiffs, v.	Case No.: CGC-02-405433 **COMPLAINT FOR RESTITUTION, CIVIL PENALTIES, INJUNCTION, AND OTHER EQUITABLE AND ANCILLARY RELIEF**

DYNEGY, INC.; DYNEGY POWER MARKETING, INC., NRG ENERGY, INC.; XCEL ENERGY, INC.; WEST COAST POWER, L.L.C.; CABRILLO POWER I, L.L.C.; CABRILLO POWER II, L.L.C.; EL SEGUNDO POWER, L.L.C.; LONG BEACH GENERATION, L.L.C.; and DOES 1-100, Defendants.	(California Business & Professions Code § 17200) (Filed Mar. 11, 2002)

The People of the State of California *ex rel.* Bill Lockyer, Attorney General of the State of California, allege the following on information and belief:

INTRODUCTION

1. This action seeks to remedy numerous acts of unfair competition dating back to June of 1998 by the defendants, who are major participants in wholesale electricity markets administered by the California Independent System Operator Corporation (the "ISO"). Defendants have conspired to engage in, and have engaged in, a scheme to violate the rules of the ISO market and to tortiously convert property to which the ISO has an exclusive possessory right, all to the detriment of the reliability of the California electricity market and California's residents and ratepayers. In particular, defendants have repeatedly sold electricity generating capacity to the ISO for use as a reserve and in the event of a system emergency, and subsequently, and unlawfully, sold the *same* capacity into the lucrative "spot" market for wholesale power. As a result, defendants have unlawfully

collected millions of dollars. The loss and misuse of these critically important reserves has posed, and continues to pose, a serious threat to the safety and reliability of the transmission grid. Plaintiff seeks an injunction requiring defendants to cease and desist from committing further acts of unfair competition. Plaintiff also seeks an Order imposing restitution, disgorgement, and civil penalties.

PARTIES

2. Plaintiff Bill Lockyer is the Attorney General of the State of California and is the chief law officer of the State (Cal. Const., art. 5, § 13). He is authorized by California Business and Professions Code § 17204 to prosecute any unlawful, unfair or fraudulent business act or practice which is prohibited by California Business and Professions Code § 17200 in a court of competent jurisdiction. For any such violation, he is also authorized to seek injunctive relief, civil penalties not to exceed two thousand five hundred dollars ($2,500) for each violation, and any orders or judgments, including the appointment of receivers, as may be necessary to prevent the use or employment by any person of any unlawful, unfair, or fraudulent business act or practices.

3. Defendant Cabrillo Power I, L.L.C. ("CABRILLO I") is a limited liability company formed under the laws of the State of Delaware. On or about February 1999, CABRILLO I acquired from San Diego Gas & Electric Company an electricity generation facility located in Encina, California. The Encina facility consists of six separate generating units with a combined capacity of approximately 976 megawatts ("MW"); CABRILLO I owns

five of the six units and has leased the sixth unit. Defendant West Coast Power, L.L.C. owns CABRILLO I.

4. CABRILLO I, on behalf of all six Encina generating units, entered into a Participating Generator Agreement with the ISO on or about February 3, 1999. This Participating Generator Agreement, as amended, governs the rights and responsibilities of CABRILLO I with respect to the conduct alleged in this Complaint.

5. Defendant Cabrillo Power II, L.L.C. ("CABRILLO II") is a limited liability company formed under the laws of the State of Delaware. On or about February 1999, CABRILLO II acquired from San Diego Gas & Electric Company ten separate electricity generating units located at seven sites throughout the San Diego area. CABRILLO II's generating units have a combined capacity of approximately 297 MW. Defendant West Coast Power, L.L.C. owns CABRILLO II.

6. CABRILLO II entered into a Participating Generator Agreement with the ISO on or about February 3, 1999. This Participating Generator Agreement, as amended, governs the rights and responsibilities of CABRILLO II with respect to the conduct alleged in this Complaint

7. Defendant El Segundo Power, L.L.C. ("EL SEGUNDO") is a limited liability company formed under the laws of the State of Delaware. On or about December 1997, EL SEGUNDO acquired from Southern California Edison Company ten separate electricity generating units located throughout the San Diego area. EL SEGUNDO's generating units have a combined capacity of approximately 1020 MW. Defendant West Coast Power, L.L.C. owns EL SEGUNDO.

8. EL SEGUNDO entered into a Participating Generator Agreement with the ISO on or about December 5, 1997. This Participating Generator Agreement, as amended, governs the rights and responsibilities of EL SEGUNDO with respect to the conduct alleged in this Complaint.

9. Defendant Long Beach Generation, L.L.C. ("LONG BEACH") is a limited liability company formed under the laws of the State of Delaware. On or about December 1997, LONG BEACH acquired from Southern California Edison Company eleven separate electricity generation units in Long Beach, California. LONG BEACH's generating units have a combined capacity of approximately 560 MW. Defendant West Coast Power, L.L.C. owns LONG BEACH.

10. LONG BEACH entered into a Participating Generator Agreement with the ISO on or about March 31, 1998. This Participating Generator Agreement, as amended, governs the rights and responsibilities of LONG BEACH with respect to the conduct alleged in this Complaint.

11. Defendant Dynegy Power Marketing, Inc., (together with its predecessor and successor entities, "DYNEGY POWER MARKETING") formerly Electric Clearinghouse, Inc., is a corporation formed under the laws of the State of Texas. DYNEGY POWER MARKETING is a company which markets and distributes energy-related products in California. DYNEGY POWER MARKETING entered into a Scheduling Coordinator Agreement with the ISO on or about May 29, 1998. This Scheduling Coordinator Agreement, as amended, governs DYNEGY POWER MARKETING's rights and

responsibilities with respect to the conduct alleged in this Complaint. At all relevant times alleged in this Complaint, DYNEGY POWER MARKETING acted in the capacity of ISO-certified scheduling coordinator for itself and for defendants CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH.

12. Defendant West Coast Power, L.L.C. (together with its predecessor and successor entities, "WEST COAST POWER") is a limited liability company formed under the laws of the State of Delaware and is a joint venture between defendants Dynegy, Inc. and NRG Energy, Inc. WEST COAST POWER owns and operates electricity generation facilities in California, including CABRILLO I, CABRILLO II, EL SEGUNDO and LONG BEACH.

13. Defendant NRG Energy, Inc. (together with its predecessor and successor entities, "NRG") is a corporation formed under the laws of the State of Delaware. NRG is a global energy company engaged in the acquisition and development of power generation facilities and the sale of energy in California. NRG, through WEST COAST POWER, has a fifty percent ownership interest in each of CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH.

14. Defendant Dynegy, Inc. (together with its predecessor and successor entities, "DYNEGY, INC."), formerly NGC Corporation, is a corporation formed under the laws of the State of Illinois. DYNEGY, INC. is engaged in the gathering, processing and transportation of energy products and services in California and worldwide. DYNEGY, INC. owns DYNEGY POWER MARKETING and has a

fifty percent ownership interest in WEST COAST POWER.

15. Defendant Xcel Energy, Inc. (together with its predecessor and successor entities, "XCEL ENERGY"), formerly Northern States Power Company, is a corporation formed under the laws of the State of Minnesota. XCEL ENERGY is an electricity and natural gas energy company which operates in twelve Western states including California. XCEL ENERGY owns approximately seventy-five percent of defendant NRG; the remaining twenty-five percent share is held by the public.

16. The true names and capacities of defendants used in this Complaint under the fictitious names of Does 1 through 100, inclusive, are unknown to the plaintiff, who sues such defendants by such fictitious names. Each of the fictitiously named defendants is responsible in some manner for acts, occurrences, or omissions which caused the violations of law alleged.

17. Unless otherwise alleged, whenever reference is made in this Complaint to any act of the defendants, such allegation shall mean that each defendant acted individually and jointly with the other defendants named in the Complaint.

18. Unless otherwise alleged, whenever reference is made in this Complaint to any act of any corporate or other business defendant, such allegation shall mean that such corporation or other business defendant did the acts alleged in this Complaint through its officers, directors, employees, agents, and/or representatives while they were acting within the actual or ostensible scope of their authority.

19. At all relevant times alleged in this Complaint, each of the defendants has acted as an agent, representative, or employee of each of the other defendants and has acted within the course and scope of said agency or representation.

20. At all relevant times alleged in this Complaint, each of the defendants has conspired, aided and abetted, or acted in concert with each other, in causing defendants DYNEGY POWER MARKETING, CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH to commit acts of unfair competition, including engaging in a common plan, scheme, or design to violate the rules of the ISO market and the terms of applicable laws and agreements, and to tortiously convert property to which the ISO had an exclusive right of possession. Through their acts alleged herein, each of the defendants acted with knowledge of said conspiracy, common plan, scheme, or design, and with the intent of carrying out such conspiracy, common plan, scheme, or design, all to the detriment of the reliability of the California electricity market, the ISO, the major investor-owned utilities, the municipal utility districts, and California's residents and ratepayers.

JURISDICTION

21. This Court has jurisdiction to hear the claims alleged in this Complaint and is a court of competent jurisdiction to grant the relief requested.

22. This Court has jurisdiction over the defendants named above because they do sufficient business in California, or otherwise have sufficient minimum contacts with California, to render the exercise of jurisdiction over

them by the California courts consistent with traditional notions of fair play and substantial justice.

VENUE

23. Venue is proper in this Court because the cause of action alleged in this Complaint, and the liability arising therefrom, arose in part in the City and County of San Francisco, and because many of the violations of law alleged herein occurred in the City and County of San Francisco.

FACTUAL ALLEGATIONS

Deregulation of California's Electricity Generation Market

24. Prior to 1996, California's major investor-owned utilities owned and controlled facilities used for the generation, transmission, and distribution of electricity to retail customers. The utilities' operations were regulated by the California Public Utilities Commission ("CPUC"), which set retail rates for each of these services pursuant to its authority under the California Constitution and the California Public Utilities Code.

25. In September 1996, the California Legislature enacted Assembly Bill 1890 ("AB 1890") in order to restructure the electric industry and bring competition to California's electricity generation market by, among other things, requiring utilities to separate their electricity generation operations from their electric power transmission and distribution operations. After the adoption of AB 1890, the utilities sought and received approval from the CPUC to divest themselves of a

number of their electricity generating plants. Defendants CABRILLO I and CABRILLO II purchased the generating facilities they now own and operate from San Diego Gas & Electric Company. Defendants EL SEGUNDO and LONG BEACH purchased the generating facilities they now own and operate from Southern California Edison Company.

26. In addition to facilitating the divestiture of utility-owned generating facilities, AB 1890 established two new entities to administer the deregulated energy market: the California Power Exchange ("PX") and the ISO. Each is a non-profit, public benefit corporation established under California state law.

27. The PX was established to operate a market for the purchase and sale of electricity for delivery during the same or the next day.

The ISO Market

28. The ISO is responsible for ensuring the safe, reliable, and efficient operation of the high voltage transmission grid. As stated in the ISO's by-laws, its "principal objective is to ensure the reliability of the California Grid, while fostering a competitive marketplace for electrical generation and related Services in California." The ISO attempts to achieve this objective by (1) managing the flow of electricity across the grid and (2) balancing demand and supply in real time.

29. The ISO's operations are governed by a Tariff and Protocols (the "ISO Tariff") on file with and approved by the Federal Energy Regulatory Commission ("FERC").

30. In order to maintain system reliability, the ISO procures both "imbalance energy" (energy needed to

balance the grid) and Ancillary Services (also known as "operating reserves" or "reserve capacity") through various market auction processes. The ISO uses the imbalance energy and Ancillary Services bought and sold in these markets to keep generation (*i.e.*, supply) and load (*i.e.*, demand) in balance on the system at all times. Generally, the costs of these services are allocated among all load-serving entities (*i.e.*, entities that use the transmission network to serve retail customers) based on their usage. California's major investor-owned utilities (Pacific Gas & Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company) and municipal utilities, which together provide service to millions of retail customers, have historically absorbed the vast majority of these costs.

31. In order to provide Ancillary Services or imbalance energy to the ISO, an entity that owns or controls electricity generating facilities must enter into a standard agreement with the ISO known as a Participating Generator Agreement ("PGA"). The PGA is a contract which, among other things, expressly requires the generator to comply with the terms of the ISO Tariff. At all relevant times alleged in this Complaint, defendants CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH were parties to separate PGAs, as amended from time to time, with the ISO.

32. A Scheduling Coordinator ("SC") is an entity authorized by the ISO to submit energy "schedules" to the ISO on behalf of electricity suppliers and purchasers. These schedules specify the amount of energy the SC expects its customers to use over the course of the next day, together with the amount of electricity generation the SC anticipates having available to meet the projected

demand. SCs submit revised schedules one hour before each operating hour in order to account for changes in weather, plant outages, and a number of other factors. The ISO analyzes the energy schedules submitted by SCs to forecast the total amount of generation and load on the system at any given time, and to determine how much energy and Ancillary Services it will need to procure to keep the system in balance.

33. In addition to being responsible for submitting balanced schedules to the ISO, SCs are the only entities authorized to submit bids to sell imbalance energy and Ancillary Services into markets administered by the ISO. A generator or power marketer wishing to participate in these auctions must bid through its SC. A generator or power marketer may serve as its own SC or use a third party to act as its SC.

34. All SCs are required to enter into a standard agreement with the ISO called a Scheduling Coordinator Agreement ("SCA"). The SCA is a contract which, among other things, expressly requires the SC to comply with the terms of the ISO Tariff. All SCs also must certify that the generators they represent have entered into PGAs with the ISO.

35. At all relevant times alleged in this Complaint, DYNEGY POWER MARKETING was a party to an SCA, as amended from time to time, with ISO. In its role as SC, defendant DYNEGY POWER MARKETING has exercised, and continues to exercise, operational control over the electricity generating units owned by defendants CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH. In addition, DYNEGY POWER MARKETING has served, and continues to serve, as the ISO's primary

point of contact for resolving any operational issues that arise in connection with the generating units owned by defendants CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH.

The Imbalance Energy Market

36. Although SCs are required to submit preliminary and revised "balanced schedules" to the ISO, actual load often deviates from the amount of scheduled generation for a number of reasons, including increased demand due to weather. In order to keep supply and demand constantly in balance, the ISO procures "imbalance energy" from several different sources.

37. The ISO's primary source of imbalance energy is the imbalance energy market, also known as the "real-time" market. No later than forty five minutes prior to the operating hour, generators and power marketers that wish to sell power into the imbalance energy market submit supply bids through their SCs specifying, among other things, the amount of energy they are willing to provide, and the price at which they are willing to provide it. The ISO then ranks all of the supply bids in order of price from lowest to highest, forming what is commonly referred to as the Balancing Energy and Ex-Post Pricing ("BEEP") stack. The ISO then selects from the BEEP stack all the bids it needs to balance the system. Generally, the last bid needed to balance the system sets the price paid to all successful bidders. The price established in this manner is the "market clearing price" for imbalance energy (also known as the "Ex Post Price"). After selecting the generating units needed to balance the system, the ISO issues dispatch instructions to each of these units directing them to produce the energy.

38. An "uninstructed deviation" occurs when a generating unit produces less (a "negative uninstructed deviation") or more (a "positive uninstructed deviation") energy in real time than it was scheduled to produce. The ISO has no way of knowing in advance the extent to which a given unit will deviate from schedule, but must take uninstructed deviations into account when balancing the system. Uninstructed deviations are determined after the fact by comparing the unit's metered output to the unit's scheduled operating level. Prior to September 2000, generators were paid the Ex Post Price for energy supplied as a result of a positive uninstructed deviation.

39. Uninstructed deviations out of Ancillary Services capacity are prohibited by the ISO Tariff.

The Ancillary Services Markets

40. In order to maintain system reliability, the ISO is authorized to procure Ancillary Services on behalf of all load-serving entities. Ancillary Services represent generating capacity that can be converted to energy and delivered to the grid in response to uncertain events, such as major plant outages, in order to maintain the safe and reliable operation of the transmission system.

41. The ISO procures four different types of Ancillary Services through market auctions run one day and one hour, respectively, ahead of each operating hour: (1) "regulation," or "automatic generation control," (2) "spinning reserves," (3) "non-spinning reserves," and (4) "replacement reserves." The first, regulation, is used primarily to maintain proper electrical frequency on the grid. The four services are distinguished by the amount of time needed to convert the reserve capacity to actual

energy and deliver it to the grid when it is called on by the ISO. The fastest-responding service is regulation. Spinning reserves are the next-fastest responding service, followed by non-spinning reserves and then replacement reserves.

42. The amount of each type of Ancillary Service that the ISO must procure in order to maintain an adequate reserve margin is dictated by standards set by the Western Systems Coordinating Council ("WSCC"), a branch of the North American Electric Reliability Council. Generally, the ISO must maintain a reserve margin equal to approximately seven percent of forecasted demand. When the reserve margin falls below a specified threshold, the ISO has authority under the ISO Tariff to declare a system emergency, and to issue any operating orders needed to preserve system reliability, including ordering the utilities to institute rolling blackouts.

43. Generators wishing to provide Ancillary Services to the ISO submit bids through their SCs specifying, among other things, the type and amount of capacity they are willing to provide, and the price at which they are willing to provide it. The ISO then selects all the bids it needs to meet its reserve requirements in a given operating hour. As in the imbalance energy market, the last bid needed to meet the reserve requirement determines the price paid to all successful bidders for any given Ancillary Service in any given operating hour. Under the ISO Tariff, Ancillary Service bids are unit-specific: once a generator or SC has been awarded an Ancillary Services bid, it may not provide the service from any unit other than the one that submitted the bid. Under the ISO Tariff, the ISO must procure Ancillary Services at the lowest possible cost consistent with maintaining system reliability.

44. A generator providing Ancillary Services capacity to ISO must, as a matter of law, keep its capacity "unloaded" (*i.e.*, held in reserve) unless and until the ISO issues a dispatch instruction directing it to produce energy from that reserve capacity. Moreover, a generator providing Ancillary Service capacity must, as a matter of law, follow ISO dispatch instructions when directed to produce energy out of that reserve capacity. When a generator submits a bid to provide Ancillary Services, it expressly warrants to the ISO that it is capable of providing the service and that it will comply with ISO dispatch instructions if the hid is accepted.

45. A generator providing Ancillary Services is entitled to payment for holding its capacity in reserve, regardless of whether or not the ISO calls on the generator to produce energy out of that capacity. In the event that the ISO issues a dispatch instruction to the generator to supply the energy and the generator complies, the generator is entitled to payment for both the reserve capacity and the resulting energy it provides.

46. The ISO has an exclusive possessory interest in all generating capacity it procures through the Ancillary Services markets. The ISO's interest includes the right to determine how much energy, if any, should be produced out of the capacity it has procured.

The Settlement Process

47. Settlement is the process administered by the ISO whereby suppliers (*i.e.*, generators and marketers) are paid for providing imbalance energy and Ancillary Services, and purchasers (*i.e.*, utilities) are billed for their usage of imbalance energy and Ancillary Services.

48. The ISO generates and sends to each SC preliminary and final settlement statements reflecting all transactions that occurred in each market the ISO administers. Under the ISO Tariff, SCs have an affirmative duty to disclose to the ISO any settlement errors in their favor that they discover. All payments from energy users are wired to a bank account in California controlled by the ISO. Similarly, all payments to SCs are wired from a California bank account controlled by the ISO.

Misconduct in the Ancillary Services Market

49. On or about June 1, 1998, defendants began to engage in a scheme to violate their Ancillary Services obligations. Instead of holding obligated Ancillary Services capacity in reserve, defendants frequently produced energy out of obligated capacity and "dumped" it into the real-time (BEEP) market in the absence of a dispatch instruction from the ISO. By engaging in this misconduct, defendants unlawfully received payments for both (1) Ancillary Service capacity (or reserves) that they did not keep unloaded; and (2) the energy produced out of those Ancillary Services commitments. The costs associated with the Ancillary Services commitments that defendants did not and could not fulfill have been passed on to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

50. In addition to producing energy out of Ancillary Services capacity in the absence of a dispatch instruction, defendants failed to comply with the ISO dispatch instructions they did receive. Instead of producing energy out of obligated Ancillary Services capacity as directed by the ISO, defendants frequently delivered less energy than was

required, or even none at all. By engaging in this misconduct, defendants unlawfully received payments for capacity that they did not provide, the costs of which were passed on, again, to the load serving entities, *i.e.,* California's investor-owned and municipal utilities.

51. As a result of this scheme, critically important reserves that the ISO relied on to preserve the safety and reliability of the transmission system were not available to serve their intended purpose. The consequences to the safety and reliability of the transmission system were serious and far-reaching. Due in part to defendants' failure to honor their Ancillary Services obligations, the ISO fell out of compliance with WSCC reliability standards on numerous occasions. These violations carried financial penalties, the costs of which have been passed on, again, to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

52. As a further result of this scheme, in order to make up for operating reserves that were no longer available for their intended purpose, the ISO was often forced to purchase imbalance energy on an "out-of-market" basis. Such "out-of-market" supplies were generally much more costly than imbalance energy dispatched through the BEEP stack. In addition, as it grew to recognize that it could no longer count on defendants and other market participants to honor their Ancillary Services obligations, the ISO began procuring larger quantities of Ancillary Services than it would otherwise have had to procure under normal conditions. This, in turn, put upward pressure on the market clearing prices for Ancillary Services and increased the amount paid to *all* suppliers of Ancillary Services, including generators who did not hold their capacity in reserve as required. Again, these increased

costs were passed on to load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

53. During the summer of 1998, the ISO sent several notices addressed to all market participants, including defendants, urging them to comply with their Ancillary Services obligations and stating that failure to do so was a breach of their contracts with the ISO and a violation of the ISO Tariff. The ISO stated in these notices, among other things, that misconduct by generators and SCs was severely compromising its ability to safely operate the transmission grid, and was imposing significant, unnecessary costs on the system.

54. Notwithstanding these and other directives from the ISO, defendants and other market participants continued to violate their Ancillary Services obligations.

55. On or about December 1998, the ISO proposed an amendment to the ISO Tariff ("Amendment 13") designed to remove the economic incentive for generators to violate their Ancillary Services obligations. Specifically, the ISO proposed that when a generator fails to provide Ancillary Services as required, it should not be paid for the capacity it failed to hold in reserve, or for any energy produced out of that capacity in the absence of a dispatch instruction.

56. On or about February 1999, FERC approved Amendment 13, and immediately thereafter the ISO began to develop a software system that would automatically implement the provisions of Amendment 13. The new system, which came to be called "No Pay," was intended to audit the performance of generating units in all hours in which they were obligated to provide Ancillary Services. No Pay would then eliminate inappropriate payments for

any Ancillary Services capacity that was not held in reserve, and for any energy produced out of committed Ancillary Service capacity in the absence of a dispatch instruction. No Pay was not fully implemented until September 2000.

57. From on or about June 1998 until the implementation of No Pay in September 2000, defendants and other market participants continued to violate their Ancillary Services obligations with impunity. They continued to collect payments for Ancillary Services they did not, and could not provide, and continued to parlay the operating reserves they were required to hold off the market into highly lucrative energy deals, thus sacrificing the safety and reliability of the transmission system serving millions of Californians, all in an effort to boost their own profitability.

58. On or about September 10, 2000, in an attempt to ensure system reliability and eliminate the financial incentive for generators to fail to honor their Ancillary Services bids, the ISO fully implemented No Pay. The No Pay system has not proven to be a successful deterrent, however, and the reliability of the ISO reserves system continues to be threatened by the misconduct of the defendants and other generators and SCs.

59. From September 10, 2000 to the present, defendants and other market participants have continued to violate their obligations to keep Ancillary Service capacity unloaded and available when bid successfully into the ISO market.

FIRST CAUSE OF ACTION ALLEGED AGAINST ALL DEFENDANTS

(Violation of Cal. Business & Professions Code § 17200)

60. Plaintiff incorporates by reference paragraphs 1 through 59 inclusive, as if fully set forth herein.

61. Section 17200 of the California Business & Professions Code prohibits unfair competition, which includes any unlawful, unfair, or fraudulent business act or practice.

62. California law prohibits the wrongful taking or substantial interference with the personal property of another.

63. DYNEGY POWER MARKETING, CABRILLO I, CABRILLO II, EL SEGUNDO LONG BEACH, and their agents violated their respective SCA and PGAs, as amended from time to time.

64. From on or about June 1998 through September 9, 2000, defendants, and each of them, engaged in unlawful, unfair, or fraudulent business acts or practices, which include, but are not limited to, the following:

a. Defendants converted, and conspired to engage in and did engage in a scheme to convert, Ancillary Services capacity and/or monies to which the ISO had an exclusive right of possession by (1) using the same energy capacity that they had sold to the ISO in the form of Ancillary Services to generate electricity to sell a second time into the real-time market in the absence of a dispatch instruction, and/or (2) failing to comply with ISO dispatch instructions to produce energy out of committed Ancillary Services capacity;

b. In addition, defendants submitted, and conspired to engage in and did engage in a scheme to submit, thousands of bids to provide Ancillary Services on behalf of the participating generators, CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH, by falsely and misleadingly warranting to the ISO that the underlying Ancillary Services capacity bid into the market would remain available and unloaded as required by law and that they would comply with the ISO's dispatch instructions to provide that capacity upon request;

c. In addition, defendants unlawfully failed to comply, and conspired to engage in and did engage in a scheme to unlawfully fail to comply, with ISO dispatch instructions to produce energy out of Ancillary Services capacity sold to the ISO as operating reserves;

d. In addition, defendants violated their agreements, and conspired to engage in and did engage in a scheme to violate their agreements, to keep said Ancillary Services capacity unloaded and available. On thousands of occasions defendants failed to comply with their obligations by (1) causing the same capacity to be sold again as energy into the real-time market, and/or (2) failing to provide the committed Ancillary Services capacity altogether;

e. In addition, defendants accepted payments, and conspired to engage in and did engage in a scheme to accept payments, for Ancillary Services that they did not and could not provide, and unlawfully failed to notify the ISO that settlements errors had been made in their favor; and

f. In addition, defendants accepted payments, and conspired to engage in and did engage in a scheme to

accept payments, for energy capacity that they unlawfully sold into the real-time market even though they had no ownership interest in that energy, having sold the underlying capacity to the ISO as Ancillary Services.

65. From on or about September 10, 2000 to the present, defendants, and each of them, have engaged and continue to engage in unlawful, unfair, or fraudulent business acts or practices, which include, but are not limited to, the following:

a. Defendants have failed to honor their Ancillary Services agreements and have conspired to engage in, and have engaged in, a scheme to fail to honor their Ancillary Services capacity bids, despite the implementation of No Pay, by (1) using the same energy capacity that they had sold to the ISO in the form of Ancillary Services to generate electricity to sell a second time into the real-time market, in the absence of a dispatch instruction, and/or (2) failing to comply with ISO dispatch instructions directing them to produce energy out of committed Ancillary Services capacity;

b. In addition, defendants submitted, and conspired to engage in and did engage in a scheme to submit bids to provide Ancillary Services on behalf of the participating generators, CABRILLO I, CABRILLO II, EL SEGUNDO, and LONG BEACH, by falsely and misleadingly warranting to the ISO that the underlying Ancillary Services capacity committed would remain available and unloaded as required by law and that they would comply with the ISO's dispatch instructions;

c. In addition, defendants violated their agreements, and conspired to engage in and did engage in a scheme to violate their agreements, to keep said Ancillary

Services capacity unloaded and available. Defendants failed to comply with their obligations by (1) causing the same capacity to be sold again into the real-time market, and/or (2) failing to provide the committed Ancillary Services capacity altogether.

66. As a result of the conduct alleged above, defendants, through their SC, DYNEGY POWER MARKETING, unlawfully and unfairly collected millions of dollars in payments for Ancillary Services they did not provide, and for energy sold into the real-time market that was legally required to be held in reserve, in specific amounts to be subject to proof at trial.

67. As a further result of the conduct alleged above, the ISO has faced and continues to face serious threats to system reliability because operating reserves it was relying on to maintain the reliability of the transmission grid were not available. In many instances, after discovering that defendants had failed to honor their Ancillary Services bids, the ISO was required to purchase emergency supplies of electricity at prices much higher than normal to keep the system in balance. Further, because it could not rely on defendants to honor their obligations, the ISO was required to procure greater amounts of Ancillary Services than it normally would have needed to meet its reserve requirements, which put upward pressure on the market clearing prices for Ancillary Services.

68. As a further result of the conduct alleged above, the ISO has incurred substantial costs for services never received. Those costs have been borne by the utilities, who act as intermediaries to provide consumers and businesses with electricity, and by California's ratepayers and taxpayers. The magnitude of the incremental costs incurred

by the ISO to safely and reliably operate the system in the face of said conduct will be subject to proof at trial.

69. As a further result of the conduct alleged above, the ISO and its market participants have incurred substantial penalties from various market-monitoring entities, including the WSCC.

70. Defendants' continuing wrongful conduct, as alleged above, unless and until restrained by an Order of this Court, will further cause great and irreparable harm to the safety and reliability of the California electricity market and to California's ratepayers and taxpayers.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For a preliminary and permanent injunction, as authorized by Cal. Bus. & Prof. Code § 17203, enjoining defendants, and each of them, their successors, agents, representatives, employees and all persons acting in concert with them, from engaging in unfair competition as defined in Cal. Bus. & Prof. Code § 17200, including, but not limited to the types of acts or practices alleged herein;

2. For an order directing defendants to pay restitution in an amount according to proof;

3. For an order directing defendants to disgorge all monies, including any profits, they gained as a result of their violations of Cal. Bus. & Prof. Code § 17200 in an amount according to proof;

4. For an order assessing civil penalties of two thousand five hundred dollars ($2,500) against each defendant for each violation of Cal. Bus. & Prof. Code

§ 17200, as authorized by Cal. Bus. & Prof. Code § 17206, in an amount according to proof;

5. For costs of suit incurred herein; and

6. For such other and further relief as the nature of the case may require and the Court deems just and proper.

Dated: 3-11-02

Respectfully submitted,

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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Plaintiffs, v.	Case No.: CGC-02-405435 **COMPLAINT FOR RESTITUTION, CIVIL PENALTIES, INJUNCTION, AND OTHER EQUITABLE AND ANCILLARY RELIEF**

RELIANT ENERGY, INC.; RELIANT ENERGY SERVICES, INC.; RELIANT ENERGY POWER GENERATION, INC.; RELIANT RESOURCES, INC.; RELIANT ENERGY COOLWATER, L.L.C.; RELIANT ENERGY ELLWOOD, L.L.C.; RELIANT ENERGY ETIWANDA, L.L.C.; RELIANT ENERGY, MANDALAY, L.L.C.; RELIANT ENERGY ORMOND BEACH, L.L.C.; and DOES 1-100, Defendants.	(California Business & Professions Code § 17200) (Filed Mar. 11, 2002)

The People of the State of California *ex rel.* Bill Lockyer, Attorney General of the State of California, allege the following on information and belief:

INTRODUCTION

1. This action seeks to remedy numerous acts of unfair competition dating back to June of 1998 by the defendants, who are major participants in wholesale electricity markets administered by the California Independent System Operator Corporation (the "ISO"). Defendants have conspired to engage in, and have engaged in, a scheme to violate the rules of the ISO market and to tortiously convert property to which the ISO has an exclusive possessory right, all to the detriment of the

reliability of the California electricity market and California's residents and ratepayers. In particular, defendants have repeatedly sold electricity generating capacity to the ISO for use as a reserve and in the event of a system emergency, and subsequently, and unlawfully, sold the *same* capacity into the lucrative "spot" market for wholesale power. As a result, defendants have unlawfully collected millions of dollars. The loss and misuse of these critically important reserves has posed, and continues to pose, a serious threat to the safety and reliability of the transmission grid. Plaintiff seeks an injunction requiring defendants to cease and desist from committing further acts of unfair competition. Plaintiff also seeks an Order imposing restitution, disgorgement, and civil penalties.

PARTIES

2. Plaintiff Bill Lockyer is the Attorney General of the State of California and is the chief law officer of the State (Cal. Const., art. 5, § 13). He is authorized by California Business and Professions Code § 17204 to prosecute any unlawful, unfair or fraudulent business act or practice which is prohibited by California Business and Professions Code § 17200 in a court of competent jurisdiction. For any such violation, he is also authorized to seek injunctive relief, civil penalties not to exceed two thousand five hundred dollars ($2,500) for each violation, and any orders or judgments, including the appointment of receivers, as may be necessary to prevent the use or employment by any person of any unlawful, unfair, or fraudulent business act or practices.

3. Defendant Reliant Energy Coolwater, L.L.C. (together with its predecessor and successor entities,

"RELIANT COOLWATER"), formerly Alta Power Generation, L.L.C., is a limited liability company formed under the laws of the State of Delaware. On or about February 1998, RELIANT COOLWATER acquired from Southern California Edison Company an electricity generation facility located in Daggett, California. The facility consists of four separate electricity generating units with a combined capacity of approximately 628 megawatts ("MW"). RELIANT COOLWATER is a wholly-owned, indirect subsidiary of defendant Reliant Energy Power Generation, Inc.

4. RELIANT COOLWATER entered into a Participating Generator Agreement with the ISO on or about February 12, 1998. This Participating Generator Agreement, as amended, governs the rights and responsibilities of RELIANT COOLWATER with respect to the conduct alleged in this Complaint.

5. Defendant Reliant Energy Ellwood, L.L.C. (together with its predecessor and successor entities, "RELIANT ELLWOOD"), formerly Oeste Power Generation, L.L.C., is a limited liability company formed under the laws of the State of Delaware. On or about February 1998, RELIANT ELLWOOD acquired from Southern California Edison Company an electricity generation facility located in Goleta, California. The facility consists of a single electricity generating unit with a capacity of approximately 48 MW. RELIANT ELLWOOD is a wholly-owned, indirect subsidiary of defendant Reliant Energy Power Generation, Inc.

6. RELIANT ELLWOOD entered into a Participating Generator Agreement with the ISO on or about February 12, 1998. This Participating Generator Agreement, as

amended, governs the rights and responsibilities of RELIANT ELLWOOD with respect to the conduct alleged in this Complaint.

7. Defendant Reliant Energy Etiwanda, L.L.C. (together with its predecessor and successor entities, "RELIANT ETIWANDA"), formerly Mountain Vista Power Generation, L.L.C., is a limited liability company formed under the laws of the State of Delaware. On or about February 1998, RELIANT ETIWANDA acquired from Southern California Edison Company an electricity generation facility located in Rancho Cucamonga, California. The facility consists of five separate electricity generating units with a combined capacity of approximately 1,044 MW. RELIANT ETIWANDA is a wholly-owned, indirect subsidiary of defendant Reliant Energy Power Generation, Inc.

8. RELIANT ETIWANDA entered into a Participating Generator Agreement with the ISO on or about February 12, 1998. This Participating Generator Agreement, as amended, governs the rights and responsibilities of RELIANT ETIWANDA with respect to the conduct alleged in this Complaint.

9. Defendant Reliant Energy Mandalay, L.L.C. (together with its predecessor and successor entities, "RELIANT MANDALAY"), formerly Ocean Vista Power Generation, L.L.C., is a limited liability company formed under the laws of the State of Delaware. On or about February 1998, RELIANT MANDALAY acquired from Southern California Edison Company an electricity generation facility located in Oxnard, California. The facility consists of three separate electricity generating units with a combined capacity of approximately 560 MW. RELIANT

MANDALAY is a wholly-owned, indirect subsidiary of defendant Reliant Energy Power Generation, Inc.

10. RELIANT MANDALAY entered into a Participating Generator Agreement with the ISO on or about February 12, 1998. This Participating Generator Agreement, as amended, governs the rights and responsibilities of RELIANT MANDALAY with respect to the conduct alleged in this Complaint.

11. Defendant Reliant Energy Ormond Beach, L.L.C. (together with its predecessor and successor entities, "RELIANT ORMOND"), formerly Ormond Beach Power Generation, L.L.C., is a limited liability company formed under the laws of the State of Delaware. On or about June 1998, RELIANT ORMOND acquired from Southern California Edison Company an electricity generation facility located in Oxnard, California. The facility consists of two separate electricity generating units with a combined capacity of approximately 1,475 MW, RELIANT ORMOND is a wholly-owned, indirect subsidiary of defendant Reliant Energy Power Generation, Inc.

12. RELIANT ORMOND entered into a Participating Generator Agreement with the ISO on or about June 4, 1998. This Participating Generator Agreement, as amended, governs the rights and responsibilities of RELIANT ORMOND with respect to the conduct alleged in this Complaint.

13. Defendant Reliant Energy Services, Inc. (together with its predecessor and successor entities, "RELIANT ENERGY SERVICES"), formerly NorAm Energy Services, Inc., is a corporation formed under the laws of the State of Delaware. RELIANT ENERGY SERVICES entered into a Scheduling Coordinator Agreement with the

ISO on or about December 11, 1997. This Scheduling Coordinator Agreement, as amended, governs RELIANT ENERGY SERVICES' rights and responsibilities with respect to the conduct alleged in this Complaint. At all relevant times alleged in this Complaint, RELIANT ENERGY SERVICES acted in the capacity of ISO-certified scheduling coordinator for itself and for defendants RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT ORMOND, and RELIANT MANDALAY.

14. Defendant Reliant Energy Power Generation, Inc. ("RELIANT ENERGY POWER GENERATION") is a corporation formed under the laws of the State of Delaware which, through its subsidiaries, does business in the State of California. RELIANT POWER GENERATION's subsidiaries include RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND. RELIANT ENERGY POWER GENERATION is a wholly-owned subsidiary of defendant Reliant Resources, Inc.

15. Defendant Reliant Resources, Inc. ("RELIANT RESOURCES") is a corporation formed under the laws of the state of Delaware which, through its subsidiaries, does business in the State of California. RELIANT RESOURCES owns RELIANT ENERGY POWER GENERATION.

16. RELIANT ENERGY, INC. ("RELIANT") is a corporation formed under the laws of the State of Delaware which; through its subsidiaries, does business in the State of California. RELIANT's subsidiaries include: RELIANT RESOURCES, RELIANT POWER GENERATION, RELIANT ENERGY SERVICES, RELIANT

COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND.

17. The true names and capacities of defendants used in this Complaint under the fictitious names of Does 1 through 100, inclusive, are unknown to the plaintiff, who sues such defendants by such fictitious names. Each of the fictitiously named defendants is responsible in some manner for acts, occurrences, or omissions which caused the violations of law alleged.

18. Unless otherwise alleged, whenever reference is made in this Complaint to any act of the defendants, such allegation shall mean that each defendant acted individually and jointly with the other defendants named in the Complaint.

19. Unless otherwise alleged, whenever reference is made in this Complaint to any act of any corporate or other business defendant, such allegation shall mean that such corporation or other business defendant did the acts alleged in this Complaint through its officers, directors, employees, agents, and/or representatives while they were acting within the actual or ostensible scope of their authority.

20. At all relevant times alleged in this Complaint, each of the defendants has acted as an agent, representative, or employee of each of the other defendants and has acted within the course and scope of said agency or representation,

21. At all relevant times alleged in this Complaint, each of the defendants has conspired, aided and abetted, or acted in concert with each other, in causing defendants

RELIANT ENERGY SERVICES, RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND to commit acts of unfair competition, including engaging in a common plan, scheme, or design to violate the rules of the ISO market and the terms of applicable laws and agreements, and to tortiously convert property to which the ISO had an exclusive right of possession. Through their acts alleged herein, each of the defendants acted with knowledge of said conspiracy, common plan, scheme, or design, and with the intent of carrying out such conspiracy, common plan, scheme, or design, all to the detriment of the reliability of the California electricity market, the ISO, the major investor-owned utilities, the municipal utility districts, and California's residents and ratepayers.

JURISDICTION

22. This Court has jurisdiction to hear the claims alleged in this Complaint and is a court of competent jurisdiction to grant the relief requested.

23. This Court has jurisdiction over the defendants named above because they do sufficient business in California, or otherwise have sufficient minimum contacts with California, to render the exercise of jurisdiction over them by the California courts consistent with traditional notions of fair play and substantial justice.

VENUE

24. Venue is proper in this Court because the cause of action alleged in this Complaint, and the liability arising therefrom, arose in part in the City and County of

San Francisco, and because many of the violations of law alleged herein occurred in the City and County of San Francisco.

FACTUAL ALLEGATIONS

Deregulation of California's Electricity Generation Market

25. Prior to 1996, California's major investor-owned utilities owned and controlled facilities used for the generation, transmission, and distribution of electricity to retail customers. The utilities' operations were regulated by the California Public Utilities Commission ("CPUC"), which set retail rates for each of these services pursuant to its authority under the California Constitution and the California Public Utilities Code.

26. In September 1996, the California Legislature enacted Assembly Bill 1890 ("AB 1890") in order to restructure the electric industry and bring competition to California's electricity generation market by, among other things, requiring utilities to separate their electricity generation operations from their electric power transmission and distribution operations. After the adoption of AB 1890, the utilities sought and received approval from the CPUC to divest themselves of a number of their electricity generating plants. Defendants RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND purchased the generating facilities they now own and operate from Southern California Edison Company.

27. In addition to facilitating the divestiture of utility-owned generating facilities, AB 1890 established two new entities to administer the deregulated energy

market: the California Power Exchange ("PX") and the ISO. Each is a non-profit, public benefit corporation established under California state law.

28. The PX was established to operate a market for the purchase and sale of electricity for delivery during the same or the next day.

The ISO Market

29. The ISO is responsible for ensuring the safe, reliable, and efficient operation of the high voltage transmission grid. As stated in the ISO's by-laws, its "principal objective is to ensure the reliability of the California Grid, while fostering a competitive marketplace for electrical generation and related Services in California." The ISO attempts to achieve this objective by (1) managing the flow of electricity across the grid and (2) balancing demand and supply in real time.

30. The ISO's operations are governed by a Tariff and Protocols (the "ISO Tariff") on file with and approved by the Federal Energy Regulatory Commission ("FERC").

31. In order to maintain system reliability, the ISO procures both "imbalance energy" (energy needed to balance the grid) and Ancillary Services (also known as "operating reserves" or "reserve capacity") through various market auction processes. The ISO uses the imbalance energy and Ancillary Services bought and sold in these markets to keep generation (*i.e.*, supply) and load (*i.e.*, demand) in balance on the system at all times. Generally, the costs of these services are allocated among all load-serving entities (*i.e.*, entities that use the transmission network to serve retail customers) based on their usage.

California's major investor-owned utilities (Pacific Gas & Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company) and municipal utilities, which together provide service to millions of retail customers, have historically absorbed the vast majority of these costs.

32. In order to provide Ancillary Services or imbalance energy to the ISO, an entity that owns or controls electricity generating facilities must enter into a standard agreement with the ISO known as a Participating Generator Agreement ("PGA"). The PGA is a contract which, among other things, expressly requires the generator to comply with the terms of the ISO Tariff. At all relevant times alleged in this Complaint, defendants RELIANT COOLWATER, RELIANT, ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND were parties to separate PGAs, as amended from time to time, with the ISO.

33. A Scheduling Coordinator ("SC") is an entity authorized by the ISO to submit energy "schedules" to the ISO on behalf of electricity suppliers and purchasers. These schedules specify the amount of energy the SC expects its customers to use over the course of the next day, together with the amount of electricity generation the SC anticipates having available to meet the projected demand. SCs submit revised schedules one hour before each operating hour in order to account for changes in weather, plant outages, and a number of other factors. The ISO analyzes the energy schedules submitted by SCs to forecast the total amount of generation and load on the system at any given time, and to determine how much energy and Ancillary Services it will need to procure to keep the system in balance.

34. In addition to being responsible for submitting balanced schedules to the ISO, SCs are the only entities authorized to submit bids to sell imbalance energy and Ancillary Services into markets administered by the ISO. A generator or power marketer wishing to participate in these auctions must bid through its SC. A generator or power marketer may serve as its own SC or use a third party to act as its SC.

35. All SCs are required to enter into a standard agreement with the ISO called a Scheduling Coordinator Agreement ("SCA"). The SCA is a contract which, among other things, expressly requires the SC to comply with the terms of the ISO Tariff. All SCs also must certify that the generators they represent have entered into PGAs with the ISO.

36. At all relevant times alleged in this Complaint, RELIANT ENERGY SERVICES was a party to an SCA, as amended from time to time, with ISO. In its role as SC, defendant RELIANT ENERGY SERVICES has exercised, and continues to exercise, operational control over the electricity generating units owned by defendants RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND. In addition, RELIANT ENERGY SERVICES has served, and continues to serve, as the ISO's primary point of contact for resolving any operational issues that arise in connection with the generating units owned by defendants RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND.

The Imbalance Energy Market

37. Although SCs are required to submit preliminary and revised "balanced schedules" to the ISO, actual load often deviates from the amount of scheduled generation for a number of reasons, including increased demand due to weather. In order to keep supply and demand constantly in balance, the ISO procures "imbalance energy" from several different sources.

38. The ISO's primary source of imbalance energy is the imbalance energy market, also known as the "real-time" market. No later than forty five minutes prior to the operating hour, generators and power marketers that wish to sell power into the imbalance energy market submit supply bids through their SCs specifying, among other things, the amount of energy they are willing to provide, and the price at which they are willing to provide it. The ISO then ranks all of the supply bids in order of price from lowest to highest, forming what is commonly referred to as the Balancing Energy and Ex-Post Pricing ("BEEP") stack. The ISO then selects from the BEEP stack all the bids it needs to balance the system. Generally, the last bid needed to balance the system sets the price paid to all successful bidders. The price established in this manner is the "market clearing price" for imbalance energy (also known as the "Ex Post Price"). After selecting the generating units needed to balance the system, the ISO issues dispatch instructions to each of these units directing them to produce the energy.

39. An "uninstructed deviation" occurs when a generating unit produces less (a "negative uninstructed deviation") or more (a "positive uninstructed deviation") energy in real time than it was scheduled to produce. The

ISO has no way of knowing in advance the extent to which a given unit will deviate from schedule, but must take uninstructed deviations into account when balancing the system. Uninstructed deviations are determined after the fact by comparing the unit's metered output to the unit's scheduled operating level. Prior to September 2000, generators were paid the Ex Post Price for energy supplied as a result of a positive uninstructed deviation.

40. Uninstructed deviations out of Ancillary Services capacity are prohibited by the ISO Tariff.

The Ancillary Services Markets

41. In order to maintain system reliability, the ISO is authorized to procure Ancillary Services on behalf of all load-serving entities. Ancillary Services represent generating capacity that can be converted to energy and delivered to the grid in response to uncertain events, such as major plant outages, in order to maintain the safe and reliable operation of the transmission system.

42. The ISO procures four different types of Ancillary Services through market auctions run one day and one hour, respectively, ahead of each operating hour: (1) "regulation," or "automatic generation control," (2) "spinning reserves," (3) "non-spinning reserves," and (4) "replacement reserves." The first, regulation, is used primarily to maintain proper electrical frequency on the grid. The four services are distinguished by the amount of time needed to convert the reserve capacity to actual energy and deliver it to the grid when it is called on by the ISO. The fastest-responding service is regulation. Spinning reserves are the next-fastest responding service,

followed by non-spinning reserves and then replacement reserves.

43. The amount of each type of Ancillary Service that the ISO must procure in order to maintain an adequate reserve margin is dictated by standards set by the Western Systems Coordinating Council ("WSCC"), a branch of the North American Electric Reliability Council. Generally, the ISO must maintain a reserve margin equal to approximately seven percent of forecasted demand. When the reserve margin falls below a specified threshold, the ISO has authority under the ISO Tariff to declare a system emergency, and to issue any operating orders 'needed to preserve system reliability, including ordering the utilities to institute rolling blackouts.

44. Generators wishing to provide Ancillary Services to the ISO submit bids through their SCs specifying, among other things, the type and amount of capacity they are willing to provide, and the price at which they are willing to provide it. The ISO then selects all the bids it needs to meet its reserve requirements in a given operating hour. As in the imbalance energy market, the last bid needed to meet the reserve requirement determines the price paid to all successful bidders for any given Ancillary Service in any given operating hour. Under the ISO Tariff, Ancillary Service bids are unit-specific: once a generator or SC has been awarded an Ancillary Services bid, it may not provide the service from any unit other than the one that submitted the bid. Under the ISO Tariff, the ISO must procure Ancillary Services at the lowest possible cost consistent with maintaining system reliability.

45. A generator providing Ancillary Services capacity to ISO must, as a matter of law, keep its capacity

"unloaded" (*i.e.*, held in reserve), unless and until the ISO issues a dispatch instruction directing it to produce energy from that reserve capacity. Moreover, a generator providing Ancillary Service capacity must, as a matter of law, follow ISO dispatch instructions when directed to produce energy out of that reserve capacity. When a generator submits a bid to provide Ancillary Services, it expressly warrants to the ISO that it is capable of providing the service and that it will comply with ISO dispatch instructions if the bid is accepted.

46. A generator providing Ancillary Services is entitled to payment for holding its capacity in reserve, regardless of whether or not the ISO calls on the generator to produce energy out of that capacity. In the event that the ISO issues a dispatch instruction to the generator to supply the energy and the generator complies, the generator is entitled to payment for both the reserve capacity and the resulting energy it provides.

47. The ISO has an exclusive possessory interest in all generating capacity it procures through the Ancillary Services markets. The ISO's interest includes the right to determine how much energy, if any, should be produced out of the capacity it has procured.

The Settlement Process

48. Settlement is the process administered by the ISO whereby suppliers (*i.e.*, generators and marketers) are paid for providing imbalance energy and Ancillary Services, and purchasers (*i.e.*, utilities) are billed for their usage of imbalance energy and Ancillary Services.

49. The ISO generates and sends to each SC preliminary and final settlement statements reflecting all transactions that occurred in each market the ISO administers. Under the ISO Tariff, SCs have an affirmative duty to disclose to the ISO any settlement errors in their favor that they discover. All payments from energy users are wired to a bank account in California controlled by the ISO. Similarly, all payments to SCs are wired from a California bank account controlled by the ISO.

Misconduct in the Ancillary Services Market

50. On or about June 1, 1998, defendants began to engage in a scheme to violate their Ancillary Services obligations. Instead of holding obligated Ancillary Services capacity in reserve, defendants frequently produced energy out of obligated capacity and "dumped" it into the real-time (BEEP) market in the absence of a dispatch instruction from the ISO. By engaging in this misconduct, defendants unlawfully received payments for both (1) Ancillary Service capacity (or reserves) that they did not keep unloaded; and (2) the energy produced out of those Ancillary Services commitments. The costs associated with the Ancillary Services commitments that defendants did not and could not fulfill have been passed on to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

51. In addition to producing energy out of Ancillary Services capacity in the absence of a dispatch instruction, defendants failed to comply with the ISO dispatch instructions they did receive. Instead of producing energy out of obligated Ancillary Services capacity as directed by the ISO, defendants frequently delivered less energy than was

required, or even none at all. By engaging in this misconduct, defendants unlawfully received payments for capacity that they did not provide, the costs of which were passed on, again, to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

52. As a result of this scheme, critically important reserves that the ISO relied on to preserve the safety and reliability of the transmission system were not available to serve their intended purpose. The consequences to the safety and reliability of the transmission system were serious and far-reaching. Due in part to defendants' failure to honor their Ancillary Services obligations, the ISO fell out of compliance with WSCC reliability standards on numerous occasions. These violations carried financial penalties, the costs of which have been passed on, again, to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

53. As a further result of this scheme, in order to make up for operating reserves that were no longer available for their intended purpose, the ISO was often forced to purchase imbalance energy on an "out-of-market" basis. Such "out-of-market" supplies were generally much more costly than imbalance energy dispatched through the BEEP stack. In addition, as it grew to recognize that it could no longer count on defendants and other market participants to honor their Ancillary Services obligations, the ISO began procuring larger quantities of Ancillary Services than it would otherwise have had to procure under normal conditions. This, in turn, put upward pressure on the market clearing prices for Ancillary Services and increased the amount paid to *all* suppliers of Ancillary Services, including generators who did not hold their capacity in reserve as required. Again, these increased

costs were passed on to load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

54. During the summer of 1998, the ISO sent several notices addressed to all market participants, including defendants, urging them to comply with their Ancillary Services obligations and stating that failure to do so was a breach of their contracts with the ISO and a violation of the ISO Tariff. The ISO stated in these notices, among other things, that misconduct by generators and SCs was severely compromising its ability to safely operate the transmission grid, and was imposing significant, unnecessary costs on the system.

55. Notwithstanding these and other directives from the ISO, defendants and other market participants continued to violate their Ancillary Services obligations.

56. On or about December 1998, the ISO proposed an amendment to the ISO Tariff ("Amendment 13") designed to remove the economic incentive for generators to violate their Ancillary Services obligations. Specifically, the ISO proposed that when a generator fails to provide Ancillary Services as required, it should not be paid for the capacity it failed to hold in reserve, or for any energy produced out of that capacity in the absence of a dispatch instruction.

57. On or about February 1999, FERC approved Amendment 13, and immediately thereafter the ISO began to develop a software system that would automatically implement the provisions of Amendment 13. The new system, which came to be called "No Pay," was intended to audit the performance of generating units in all hours in which they were obligated to provide Ancillary Services. No Pay would then eliminate inappropriate payments for

any Ancillary Services capacity that was not held in reserve, and for any energy produced out of committed Ancillary Service capacity in the absence of a dispatch instruction. No Pay was not fully implemented until September 2000.

58. From on or about June 1998 until the implementation of No Pay in September 2000, defendants and other market participants continued to violate their Ancillary Services obligations with impunity. They continued to collect payments for Ancillary Services they did not and could not provide, and continued to parlay the operating reserves they were required to hold off the market into highly lucrative energy deals, thus sacrificing the safety and reliability of the transmission system serving millions of Californians, all in an effort to boost their own profitability.

59. On or about September 10, 2000, in an attempt to ensure system reliability and eliminate the financial incentive for generators to fail to honor their Ancillary Services bids, the ISO fully implemented No Pay. The No Pay system has not proven to be a successful deterrent, however, and the reliability of the ISO reserves system continues to be threatened by the misconduct of the defendants and other generators and SCs.

60. From September 10, 2000 to the present, defendants and other market participants have continued to violate their obligations to keep Ancillary Service capacity unloaded and available when bid successfully into the ISO market.

FIRST CAUSE OF ACTION
ALLEGED AGAINST ALL DEFENDANTS

(Violation of Cal. Business & Professions Code § 17200)

61. Plaintiff incorporates by reference paragraphs 1 through 60 inclusive, as if fully set forth herein.

62. Section 17200 of the California Business & Professions Code prohibits unfair competition, which includes any unlawful, unfair, or fraudulent business act or practice.

63. California law prohibits the wrongful taking or substantial interference with the personal property of another.

64. RELIANT ENERGY SERVICES, RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, RELIANT ORMOND, and their agents violated their respective SCA and PGAs, as amended from time to time.

65. From on or about June 1998 through September 9, 2000, defendants, and each of them, engaged in unlawful, unfair, or fraudulent business acts or practices, which include, but are not limited to, the following:

a. Defendants converted, and conspired to engage in and did engage in a scheme to convert, Ancillary Services capacity and/or monies to which the ISO had an exclusive right of possession by (1) using the same energy capacity that they had sold to the ISO in the form of Ancillary Services to generate electricity to sell a second time into the real-time market, in the absence of a dispatch instruction, and/or (2) failing to comply with ISO

dispatch instructions to produce energy out of committed Ancillary Services capacity;

b. In addition, defendants submitted, and conspired to engage in and did engage in a scheme to submit bids to provide Ancillary Services on behalf of the participating generators, RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND, by falsely and misleadingly warranting to the ISO that the underlying Ancillary Services capacity bid into the market would remain available and unloaded as required by law and that they would comply with the ISO's dispatch instructions to provide that capacity upon request;

c. In addition, defendants unlawfully failed to comply, and conspired to engage in and did engage in a scheme to unlawfully fail to comply, with ISO dispatch instructions to produce energy out of Ancillary Services capacity sold to the ISO as operating reserves;

d. In addition, defendants violated their agreements, and conspired to engage in and did engage in a scheme to violate their agreements, to keep said Ancillary Services capacity unloaded and available. On thousands of occasions defendants failed to comply with their obligations by (1) causing the same capacity to be sold again as energy into the real-time market, and/or (2) failing to provide the committed Ancillary Services capacity altogether;

e. In addition, defendants accepted payments, and conspired to engage in and did engage in a scheme to accept payments, for Ancillary Services that they did not and could not provide, and unlawfully failed to notify the

ISO that settlements errors had been made in their favor; and

f. In addition, defendants accepted payments, and conspired to engage in and did engage in a scheme to accept payments, for energy capacity that they unlawfully sold into the real-time market even though they had no ownership interest in that energy, having sold the underlying capacity to the ISO as Ancillary Services.

66. From on or about September 10, 2000 to the present, defendants, and each of them, have engaged and continue to engage in unlawful, unfair, or fraudulent business acts or practices, which include, but are not limited to, the following:

a. Defendants have failed to honor their Ancillary Services agreements and have conspired to engage in, and have engaged in, a scheme to fail to honor their Ancillary Services capacity bids, despite the implementation of No Pay, by (1) using the same energy capacity that they had sold to the ISO in the form of Ancillary Services to generate electricity to sell a second time into the real-time market in the absence of a dispatch instruction and/or (2) failing to comply with ISO dispatch instructions directing them to produce energy out of committed Ancillary Services capacity;

b. In addition, defendants submitted, and conspired to engage in and did engage in a scheme to submit, thousands of bids to provide Ancillary Services on behalf of the participating generators, RELIANT COOLWATER, RELIANT ELLWOOD, RELIANT ETIWANDA, RELIANT MANDALAY, and RELIANT ORMOND, by falsely and misleadingly warranting to the ISO that the underlying Ancillary Services capacity committed would

remain available and unloaded as required by law and that they would comply with ISO's dispatch instructions;

c. In addition, defendants violated their agreements, and conspired to engage in and did engage in a scheme to violate their agreements, to keep said Ancillary Services capacity unloaded and available. Defendants failed to comply with their obligations by (1) causing the same capacity to be sold again into the real-time market, and/or (2) failing to provide the committed Ancillary Services capacity altogether.

67. As a result of the conduct alleged above, defendants, through their SC, RELIANT ENERGY SERVICES, unlawfully and unfairly collected millions of dollars in payments for Ancillary Services they did not provide, and for energy sold into the real-time market that was legally required to be held in reserve, in specific amounts to be subject to proof at trial.

68. As a further result of the conduct alleged above, the ISO has faced and continues to face serious threats to system reliability because operating reserves it was relying on to maintain the reliability of the transmission grid were not available. In many instances, after discovering that defendants had failed to honor their Ancillary Services bids, the ISO was required to purchase emergency supplies of electricity at prices much higher than normal to keep the system in balance. Further, because it could not rely on defendants to honor their obligations, the ISO was required to procure greater amounts of Ancillary Services than it normally would have needed to meet its reserve requirements, which put upward pressure on the market clearing prices for Ancillary Services.

69. As a further result of the conduct alleged above, the ISO has incurred substantial costs for services never received. Those costs have been borne by the utilities, who act as intermediaries to provide consumers and businesses with electricity, and by California's ratepayers and taxpayers. The magnitude of the incremental costs incurred by the ISO to safely and reliably operate the system in the face of said conduct will be subject to proof at trial.

70. As a further result of the conduct alleged above, the ISO and its market participants have incurred substantial penalties from various market-monitoring entities, including the WSCC.

71. Defendants' continuing wrongful conduct, as alleged above, unless and until restrained by an Order of this Court, will further cause great and irreparable harm to the safety and reliability of the California electricity market and to California's ratepayers and taxpayers.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For a preliminary and permanent injunction, as authorized by Cal. Bus. & Prof. Code § 17203, enjoining defendants, and each of them, their successors, agents, representatives, employees and all persons acting in concert with them, from engaging in unfair competition as defined in Cal. Bus. & Prof. Code § 17200, including, but not limited to the types of acts or practices alleged herein;

2. For an order directing defendants to pay restitution in an amount according to proof;

3. For an order directing defendants to disgorge all monies, including any profits, they gained as a result of their violations of Cal. Bus. & Prof. Code § 17200 in an amount according to proof;

4. For an order assessing civil penalties of two thousand five hundred dollars ($2,500) against each defendant for each violation of Cal. Bus. & Prof. Code § 17200, as authorized by Cal. Bus. & Prof. Code § 17206, in an amount according to proof;

5. For costs of suit incurred herein; and

6. For such other and further relief as the nature of the case may require and the Court deems just and proper.

Dated: 3-11-02

Respectfully submitted,

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Plaintiffs, v.	Case No.: CGC-02-405429 **COMPLAINT FOR RESTITUTION, CIVIL PENALTIES, INJUNCTION, AND OTHER EQUITABLE AND ANCILLARY RELIEF**

MIRANT CORPORATION; MIRANT CALIFORNIA, L.L.C.; MIRANT DELTA, L.L.C.; MIRANT POTRERO, L.L.C.; MIRANT AMERICAS ENERGY MARKETING, L.P.; MIRANT CALIFORNIA INVESTMENTS, INC.; MIRANT AMERICAS, INC.; SOUTHERN ENERGY GOLDEN STATES HOLDINGS, INC.; and DOES 1-100, Defendants.	(California Business & Professions Code § 17200) (Filed Mar. 11, 2002)

The People of the State of California *ex rel.* Bill Lockyer, Attorney General of the State of California, allege the following on information and belief:

INTRODUCTION

1. This action seeks to remedy numerous acts of unfair competition dating back to March of 1999 by the defendants, who are major participants in wholesale electricity markets administered by the California Independent System Operator Corporation (the "ISO"). Defendants have conspired to engage in, and have engaged in, a scheme to violate the rules of the ISO market and to tortiously convert property to which the ISO has an exclusive possessory right, all to the detriment of the reliability of the California electricity market and California's residents and ratepayers. In particular, defendants have repeatedly sold electricity generating capacity to the ISO for use as a reserve and in the event of a system emergency, and subsequently, and unlawfully, sold the

same capacity into the lucrative "spot" market for wholesale power. As a result, defendants have unlawfully collected millions of dollars. The loss and misuse of these critically important reserves has posed, and continues to pose, a serious threat to the safety and reliability of the transmission grid. Plaintiff seeks an injunction requiring defendants to cease and desist from committing further acts of unfair competition. Plaintiff also seeks an Order imposing restitution, disgorgement, and civil penalties.

PARTIES

2. Plaintiff Bill Lockyer is the Attorney General of the State of California and is the chief law officer of the State (Cal. Const., art. 5, § 13). He is authorized by California Business and Professions Code § 17204 to prosecute any unlawful, unfair or fraudulent business act or practice which is prohibited by California Business and Professions Code § 17200 in a court of competent jurisdiction. For any such violation, he is also authorized to seek injunctive relief, civil penalties not to exceed two thousand five hundred dollars ($2,500) for each violation, and any orders or judgments, including the appointment of receivers, as may be necessary to prevent the use or employment by any person of any unlawful, unfair, or fraudulent business act or practices.

3. Defendant Mirant Delta, L.L.C. (together with its predecessor and successor entities, "MIRANT DELTA"), formerly Southern Energy Delta, L.L.C., is a limited liability company formed under the laws of the State of Delaware. On or about March 1999, MIRANT DELTA acquired from Pacific Gas & Electric Company two separate electricity generation facilities located in Contra

Costa County, California, the Pittsburg and Contra Costa Power Plants. The two facilities consist of eleven separate generating units with a combined capacity of approximately 2700 megawatts ("MW"). MIRANT DELTA is a wholly-owned subsidiary of defendant Mirant California, L.L.C.

4. MIRANT DELTA entered into a Participating Generator Agreement with the ISO on or about March 4, 1999. This Participating Generator Agreement, as amended, governs the rights and responsibilities of MIRANT DELTA with respect to the conduct alleged in this Complaint.

5. Defendant Mirant Potrero, L.L.C. (together with its predecessor and successor entities, "MIRANT POTRERO"), formerly Southern Energy Potrero, L.L.C., is a limited liability company formed under the laws of the State of Delaware. On or about March 1999, MIRANT POTRERO acquired from Pacific Gas & Electric Company the Potrero Power Plant, an electricity generation facility located in San Francisco, California. The Potrero Power Plant consists of four electricity generating units with a total capacity of approximately 400 MW. MIRANT POTRERO is a wholly-owned subsidiary of defendant Mirant California, L.L.C.

6. MIRANT POTRERO entered into a Participating Generator Agreement with the on or about March 4, 1999. This Participating Generator Agreement, as amended, governs the rights and responsibilities of MIRANT POTRERO with respect to the conduct alleged in this Complaint.

7. Defendant Mirant Americas Energy Marketing, L.P. (together with its predecessor and successor entities,

"MIRANT AMERICAS ENERGY MARKETING"), formerly Southern Company Energy Marketing, L.P., is a limited partnership formed under the laws of the State of Delaware, and a wholly-owned indirect subsidiary of defendant Mirant Corporation, MIRANT AMERICAS ENERGY MARKETING markets and distributes energy-related products in California. MIRANT AMERICAS ENERGY MARKETING entered into a Scheduling Coordinator Agreement with the ISO on or about December 1, 1997. This Scheduling Coordinator Agreement, as amended, governs MIRANT AMERICAS ENERGY MARKETING's rights and responsibilities with respect to the conduct alleged in this Complaint. At all relevant times alleged in this Complaint, MIRANT AMERICAS ENERGY MARKETING acted in the capacity of ISO-certified scheduling coordinator ("SC") for itself and for defendants MIRANT DELTA and MIRANT POTRERO.

8. Defendant Mirant California, L.L.C. ("MIRANT CALIFORNIA"), formerly Southern Energy California, L.L.C., is a limited liability company formed under the laws of the State of Delaware that does business in the State of California. MIRANT CALIFORNIA is engaged in the marketing and brokering of electric energy and capacity, and is the parent company of MIRANT DELTA and MIRANT POTRERO. MIRANT CALIFORNIA is fifty percent owned by each of defendants Mirant California Investments, Inc. and Southern Energy Golden States Holdings, Inc.

9. Defendant Mirant California Investments, Inc. ("MIRANT CALIFORNIA INVESTMENTS"), formerly Southern Energy California, L.L.C., is a corporation formed under the laws of the State of Delaware that does business in the State of California. MIRANT CALIFORNIA INVESTMENTS

is a subsidiary of defendant Mirant Americas, Inc. and owns a fifty percent interest in MIRANT CALIFORNIA.

10. Defendant Southern Energy Golden States Holdings, Inc. ("SOUTHERN ENERGY HOLDINGS") is a corporation formed under the laws of the State of Delaware that does business in the State of California. SOUTHERN ENERGY HOLDINGS is a subsidiary of defendant Mirant Americas, Inc. and owns a fifty percent interest in MIRANT CALIFORNIA.

11. Defendant Mirant Americas, Inc. ("MIRANT AMERICAS"), formerly Southern Energy North America, Inc., is a corporation formed under the laws of the State of Delaware which through its subsidiaries does business in the State of California. MIRANT AMERICAS is a subsidiary of Mirant Corporation and is the parent company of MIRANT CALIFORNIA INVESTMENTS and SOUTHERN ENERGY HOLDINGS.

12. Defendant Mirant Corporation (together with its subsidiaries, "MIRANT"), formerly Southern Energy, Inc., is a corporation formed under the laws of the State of Delaware which, through its subsidiaries, does business in the State of California. MIRANT is a global energy company that develops, constructs, owns and operates power plants, and sells wholesale electricity, gas, and other energy-related commodity products. MIRANT's subsidiaries include MIRANT DELTA, MIRANT POTRERO, MIRANT AMERICAS ENERGY MARKETING, MIRANT CALIFORNIA, MIRANT CALIFORNIA INVESTMENTS, SOUTHERN ENERGY HOLDINGS, and MIRANT AMERICAS.

13. The true names and capacities of defendants used in this Complaint under the fictitious names of Does

1 through 100, inclusive, are unknown to the plaintiff, who sues such defendants by such fictitious names. Each of the fictitiously named defendants is responsible in some manner for acts, occurrences, or omissions which caused the violations of law alleged.

14. Unless otherwise alleged, whenever reference is made in this Complaint to any act of the defendants, such allegation shall mean that each defendant acted individually and jointly with the other defendants named in the Complaint.

15. Unless otherwise alleged, whenever reference is made in this Complaint to any act of any corporation or other business defendant, such allegation shall mean that such corporation or other business defendant did the acts alleged in this Complaint through its officers, directors, employees, agents, and/or representatives while they were acting within the actual or ostensible scope of their authority.

16. At all relevant times alleged in this Complaint, each of the defendants has acted as an agent, representative, or employee of each of the other defendants and has acted within the course and scope of said agency or representation.

17. At all relevant times alleged in this Complaint, each of the defendants has conspired, aided and abetted, or acted in concert with each other, in causing defendants MIRANT AMERICAS ENERGY MARKETING, MIRANT DELTA, and MIRANT POTRERO to commit acts of unfair competition, including engaging in a common plan, scheme, or design to violate the rules of the ISO market and the term of applicable laws and agreements, and to tortiously convert, property to which the ISO had an

exclusive right of possession. Through their acts alleged herein each of the defendants acted with knowledge of said conspiracy, common plan, scheme, or design, and with the intent of carrying out such conspiracy, common plan, scheme, or design, all to the detriment of the reliability of the California electricity market, the ISO, the major investor- owned utilities, the municipal utility districts, and California's residents and ratepayers.

JURISDICTION

18. This Court has jurisdiction to hear the claims alleged in this Complaint and is a court of competent jurisdiction to grant the relief requested.

19. This Court has jurisdiction over the defendants named above because they do sufficient business in California, or otherwise have sufficient minimum contacts with California, to render the exercise of jurisdiction over them by the California courts consistent with traditional notions of fair play and substantial justice.

VENUE

20. Venue is proper in this Court because the cause of action alleged in this Complaint, and the liability arising therefrom, arose in part in the City and County of San Francisco, and because many of the violations of law alleged herein occurred in the City and County of San Francisco.

FACTUAL ALLEGATIONS

Deregulation of California's Electricity Generation Market

21. Prior to 1996, California's major investor-owned utilities owned and controlled facilities used for the generation, transmission, and distribution of electricity to retail customers. The utilities' operations were regulated by the California Public Utilities Commission ("CPUC") which set retail rates for each of these services pursuant to its authority under the California Constitution and the California Public Utilities Code.

22. In September 1996, the California Legislature enacted Assembly Bill 1890 ("AB 1890") in order to restructure the electric industry and bring competition to California's electricity generation market by, among other things, requiring utilities to separate their electricity generation operations from their electric power transmission and distribution operations. After the adoption of AB 1890, the utilities sought and received approval from the CPUC to divest themselves of a number of their electricity generating plants. Defendants MIRANT DELTA and MIRANT POTRERO purchased the generating facilities they now own and operate from Pacific Gas & Electric Company.

23. In addition to facilitating the divestiture of utility-owned generating facilities, AB 1890 established two new entities to administer the deregulated energy market: the California Power Exchange ("PX") and the ISO. Each is a non-profit, public benefit corporation established under California state law.

24. The PX was established to operate a market for the purchase and sale of electricity for delivery during the same or the next day.

The ISO Market

25. The ISO is responsible for ensuring the safe, reliable, and efficient operation of the high voltage transmission grid. As stated in the ISO's by-laws, its "principal objective is to ensure the reliability of the California Grid, while festering a competitive marketplace for electrical generation and related Services in California." The ISO attempts to achieve this objective by (1) managing the flow of electricity across the grid and (2) balancing demand and supply in real time.

26. The ISO's operations are governed by a Tariff and Protocols (the "ISO Tariff") on file with and approved by the Federal Energy Regulatory Commission ("FERC").

27. In order to maintain system reliability, the ISO procures both "imbalance energy" (energy needed to balance the grid) and Ancillary Services (also known as "operating reserves" or "reserve capacity") through various market auction processes. The ISO uses the imbalance energy and Ancillary Services bought and sold in these markets to keep generation (*i.e.*, supply) and load (*i.e.*, demand) in balance on the system at all times. Generally, the costs of these services are allocated among all load-serving entities (*i.e.*, entities that use the transmission network to serve retail customers) based on their usage. California's major investor-owned utilities (Pacific Gas & Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company) and municipal utilities, which together provide service to millions of

retail customers, have historically absorbed the vast majority of these costs.

28. In order to provide Ancillary Services or imbalance energy to the ISO, an entity that owns or controls electricity generating facilities must enter into a standard agreement with the ISO known as a Participating Generator Agreement ("PGA"). The PGA is a contract which, among other things, expressly requires the generator to comply with the terms of the ISO Tariff. At all relevant times alleged in this Complaint, defendants MIRANT DELTA and MIRANT POTRERO were parties to separate PGAs, as amended from time to time, with the ISO.

29. A Scheduling Coordinator ("SC") is an entity authorized by the ISO to submit energy "schedules" to the ISO on behalf of electricity suppliers and purchasers. These schedules specify the amount of energy the SC expects its customers to use over the course of the next day, together with the amount of electricity generation the SC anticipates having available to meet the projected demand. SCs submit revised schedules one hour before each operating hour in order to account for changes in weather, plant outages, and a number of other factors. The ISO analyzes the energy schedules submitted by SCs to forecast the total amount of generation and load on the system at any given time, and to determine how much energy and Ancillary Services it will need to procure to keep the system in balance.

30. In addition to being responsible for submitting balanced schedules to the ISO, SCs are the only entities authorized to submit bids to sell imbalance energy and Ancillary Services into markets administered by the ISO. A generator or power marketer wishing to participate in

these auctions must bid through its SC. A generator or power marketer may serve as its own SC or use a third party to act as its SC.

31. All SCs are required to enter into a standard agreement with the ISO called a Scheduling Coordinator Agreement ("SCA"). The SCA is a contract which, among other things, expressly requires the SC to comply with the terms of the ISO Tariff. All SCs also must certify that the generators they represent have entered into PGAs with the ISO.

32. At all relevant times alleged in this Complaint, MIRANT AMERICAS ENERGY MARKETING was a party to an SCA, as amended from time to time, with the ISO. In its role as SC, defendant MIRANT AMERICAS ENERGY MARKETING has exercised, and continues to exercise, operational control over the electricity generating units owned by defendants MIRANT DELTA and MIRANT POTRERO. In addition, MIRANT AMERICAS ENERGY MARKETING, has served, and continues to serve, as the ISO's primary point of contact for resolving any operational issues that arise in connection with the generating units owned by defendants MIRANT DELTA and MIRANT POTRERO.

The Imbalance Energy Market

33. Although SCs are required to submit preliminary and revised "balanced schedules" to the ISO, actual load often deviates from the amount of scheduled generation for a number of reasons, including increased demand due to weather. In order to keep supply and demand constantly in balance, the ISO procures "imbalance energy" from several different sources.

34. The ISO's primary source of imbalance energy is the imbalance energy market, also known as the "real-time" market. No later than forty five minutes prior to the operating hour, generators and power marketers that wish to sell power into the imbalance energy market submit supply bids through their SCs specifying, among other things, the amount of energy they are willing to provide, and the price at which they are willing to provide it. The ISO then ranks all of the supply bids in order of price from lowest to highest, forming what is commonly referred to as the Balancing Energy and Ex-Post Pricing ("BEEP") stack. The ISO then selects from the BEEP stack all the bids it needs to balance the system. Generally, the last bid needed to balance the system sets the price paid to all successful bidders. The price established in this manner is the "market clearing price" for imbalance energy (also known as the "Ex Post Price"). After selecting the generating units needed to balance the system, the ISO issues dispatch instructions to each of these units directing them to produce the energy.

35. An "uninstructed deviation" occurs when a generating unit produces less (a "negative uninstructed deviation") or more (a "positive uninstructed deviation") energy in real time than it was scheduled to produce. The ISO has no way of knowing in advance the extent to which a given unit will deviate from schedule, but must take uninstructed deviations into account when balancing the system. Uninstructed deviations are determined after the fact by comparing the unit's metered output to the unit's scheduled operating level. Prior to September 2000, generators were paid the Ex Post Price for energy supplied as a result of a positive uninstructed deviation.

36. Uninstructed deviations out of Ancillary Services capacity are prohibited by the ISO Tariff.

The Ancillary Services Markets

37. In order to maintain system reliability, the ISO is authorized to procure Ancillary Services on behalf of all load-serving entities. Ancillary Services represent generating capacity that can be converted to energy and delivered to the grid in response to uncertain events, such as major plant outages, in order to maintain the safe and reliable operation of the transmission system.

38. The ISO procures four different types of Ancillary Services through market auctions run one day and one hour, respectively, ahead of each operating hour: (1) "regulation," or "automatic generation control," (2) "spinning reserves," (3) "non-spinning reserves," and (4) "replacement reserves." The first, regulation, is used primarily to maintain proper electrical frequency on the grid. The four services are distinguished by the amount of time needed to convert the reserve capacity to actual energy and deliver it to the grid when it is called on by the ISO. The fastest-responding service is regulation. Spinning reserves are the next-fastest responding service, followed by non-spinning reserves and then replacement reserves.

39. The amount of each type of Ancillary Service that the ISO must procure in order to maintain an adequate reserve margin is dictated by standards set by the Western Systems Coordinating Council ("WSCC"), a branch of the North American Electric Reliability Council. Generally, the ISO must maintain a reserve margin equal to approximately seven percent of forecasted demand. When

the reserve margin falls below a specified threshold, the ISO has authority under the ISO Tariff to declare a system emergency, and to issue any operating orders needed to preserve system reliability, including ordering the utilities to institute rolling blackouts.

40. Generators wishing to provide Ancillary Services to the ISO submit bids through their SCs specifying, among other things, the type and amount of capacity they are willing to provide, and the price at which they are willing to provide it. The ISO then selects all the bids it needs to meet its reserve requirements in a given operating hour. As in the imbalance energy market, the last bid needed to meet the reserve requirement determines the price paid to all successful bidders for any given Ancillary Service in any given operating hour. Under the ISO Tariff, Ancillary Service bids are unit-specific: once a generator or SC has been awarded an Ancillary Services bid, it may not provide the service from any unit other than the one that submitted the bid. Under the ISO Tariff, the ISO must procure Ancillary Services at the lowest possible cost consistent with maintaining system reliability.

41. A generator providing Ancillary Services capacity to ISO must, as a matter of law, keep its capacity "unloaded" (*i.e.*, held in reserve) unless and until the ISO issues a dispatch instruction directing it to produce energy from that reserve capacity. Moreover, a generator providing Ancillary Service capacity must, as a matter of law, follow ISO dispatch instructions when directed to produce energy out of that reserve capacity. When a generator submits a bid to provide Ancillary Services, it expressly warrants to the ISO that it is capable of providing the service and that it will comply with ISO dispatch instructions if the bid is accepted.

42. A generator providing Ancillary Services is entitled to payment for holding its capacity in reserve, regardless of whether or not the ISO calls on the generator to produce energy out of that capacity. In the event that the ISO issues a dispatch instruction to the generator to supply the energy and the generator complies, the generator is entitled to payment for both the reserve capacity and the resulting energy it provides.

43. The ISO has an exclusive possessory interest in all generating capacity it procures through the Ancillary Services markets. The ISO's interest includes the right to determine how much energy, if any, should be produced out of the capacity it has procured.

The Settlement Process

44. Settlement is the process administered by the ISO whereby suppliers (*i.e.*, generators and marketers) are paid for providing imbalance energy and Ancillary Services, and purchasers (*i.e.*, utilities) are billed for their usage of imbalance energy and Ancillary Services.

45. The ISO generates and sends to each SC preliminary and final settlement statements reflecting all transactions that occurred in each market the ISO administers. Under the ISO Tariff, SCs have an affirmative duty to disclose to the ISO any settlement errors in their favor, that they discover. All payments from energy users are wired to a bank account in California controlled by the ISO. Similarly, all payments to SCs are wired from a California bank account controlled by the ISO.

Misconduct in the Ancillary Services Market

46. On or about March 1999, defendants began to engage in a scheme to violate their Ancillary Services obligations. Instead of holding obligated Ancillary Services capacity in reserve, defendants frequently produced energy out of obligated capacity and "dumped" it into the real-time (BEEP) market in the absence of a dispatch instruction from the ISO. By engaging in this misconduct, defendants unlawfully received payments for both (1) Ancillary Service capacity (or reserves) that they did not keep unloaded; and (2) the energy produced out of those Ancillary Services commitments. The costs associated with the Ancillary Services commitments that defendants did not and could not fulfill have been passed on to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

47. In addition to producing energy out of Ancillary Services capacity in the absence of a dispatch instruction, defendants failed to comply with the ISO dispatch instructions they did receive. Instead of producing energy out of obligated Ancillary Services capacity as directed by the ISO, defendants frequently delivered less energy than was required, or even none at all. By engaging in this misconduct, defendants unlawfully received payments for capacity that they did not provide, the costs of which were passed on, again, to the load serving entities, *i.e.*, California's investor owned and municipal utilities.

48. As a result of this scheme, critically important reserves that the ISO relied on to preserve the safety and reliability of the transmission system were not available to serve their intended purpose. The consequences to the safety and reliability of the transmission system were serious and far-reaching. Due in part to defendants' failure

to honor their Ancillary Services obligations, the ISO fell out of compliance with WSCC reliability standards on numerous occasions. These violations carried financial penalties, the costs of which have been passed on, again, to the load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

49. As a further result of this scheme, in order to make up for operating reserves that were no longer available for their intended purpose; the ISO was often forced to purchase imbalance energy on an "out-of-market" basis. Such "out-of-market" supplies were generally much more costly than imbalance energy dispatched through the BEEP stack. In addition, as it grew to recognize that it could no longer count on defendants and other market participants to honor their Ancillary Services obligations, the ISO began procuring larger quantities of Ancillary Services than it would otherwise have had to procure under normal conditions. This, in turn, put upward pressure on the market clearing prices for Ancillary Services and increased the amount paid to *all* suppliers of Ancillary Services, including generators who did not hold their capacity in reserve as required. Again, these increased costs were passed on to load-serving entities, *i.e.*, California's investor-owned and municipal utilities.

50. During the summer of 1998, the ISO sent several notices addressed to all market participants, including defendants, urging them to comply with their Ancillary Services obligations and stating that failure to do so was a breach of their contracts with the ISO and a violation of the ISO Tariff. The ISO stated in these notices, among other things, that misconduct by generators and SCs was severely compromising its ability to safely operate the

transmission grid, and was imposing significant, unnecessary costs on the system.

51. Notwithstanding these and other directives from the ISO, defendants and other market participants violated their Ancillary Services obligations.

52. On or about December 1998, the ISO proposed an amendment to the ISO Tariff ("Amendment 13") designed to remove the economic incentive for generators to violate their Ancillary Services obligations. Specifically, the ISO proposed that when a generator fails to provide Ancillary Services as required, it should not be paid for the capacity it failed to hold in reserve, or for any energy produced out of that capacity in the absence of a dispatch instruction.

53. On or about February 1999, FERC approved Amendment 13, and immediately thereafter the ISO began to develop a software system that would automatically implement the provisions of Amendment 13. The new system, which came to be called "No Pay," was intended to audit the performance of generating units in all hours in which they were obligated to provide Ancillary Services. No Pay would then eliminate inappropriate payments for any Ancillary Services capacity that was not held in reserve, and for any energy produced out of committed Ancillary Service capacity in the absence of a dispatch instruction. No Pay was not fully implemented until September 2000.

54. From on or about March 1999 until the implementation of No Pay in September 2000, defendants and other market participants continued to violate their Ancillary Services obligations with impunity. They continued to collect payments for Ancillary Services they did not

and could not provide, and continued to parlay the operating reserves they were required to hold off the market into highly lucrative energy deals, thus sacrificing the safety and reliability of the transmission system serving millions of Californians, all in an effort to boost their own profitability.

55. On or about September 10, 2000, in an attempt to ensure system reliability and eliminate the financial incentive for generators to fail to honor their Ancillary Services bids, the ISO fully implemented No Pay. The No Pay system has not proven to be a successful deterrent, however, and the reliability of the ISO reserves system continues to be threatened by the misconduct of the defendants and other generators and SCs.

56. From September 10, 2000 to the present, defendants and other market participants have continued to violate their obligations to keep Ancillary Service capacity unloaded and available when bid successfully into the ISO market.

FIRST CAUSE OF ACTION ALLEGED AGAINST ALL DEFENDANTS

(Violation of Cal. Business & Professions Code § 17200)

57. Plaintiff incorporates by reference paragraphs 1 through 56 inclusive, as if fully set forth herein.

58. Section 17200 of the California Business & Professions Code prohibits unfair competition, which includes any unlawful, unfair, or fraudulent business act or practice.

59. California law prohibits the wrongful taking or substantial interference with the personal property of another.

60. MIRANT AMERICAS ENERGY MARKETING, MIRANT DELTA, MIRANT POTRERO, and their agents violated their respective SCA and PGAs, as amended from time to time.

61. From on or about March 1999 through September 9, 2000, defendants, and each of them, engaged in unlawful, unfair, or fraudulent business acts or practices, which include, but are not limited to, the following:

a. Defendants converted, and conspired to engage in and did engage in a scheme to convert, Ancillary Services capacity and/or monies to which the ISO had an exclusive right of possession by (1) using the same energy capacity that they had sold to the ISO in the form of Ancillary Services to generate electricity to sell a second time into the real-time market, in the absence of a dispatch instruction, and/or (2) failing to comply with ISO dispatch instructions to produce energy out of committed Ancillary Services capacity;

b. In addition, defendants submitted, and conspired to engage in and did engage in a scheme to submit, thousands of bids to provide Ancillary Services on behalf of the participating generators, MIRANT DELTA and MIRANT POTRERO, by falsely and misleadingly warranting to the ISO that the underlying Ancillary Services capacity bid into the market would remain available and unloaded as required by law and that they would comply with the ISO's dispatch instructions to provide that capacity upon request;

c. In addition, defendants unlawfully failed to comply, and conspired to engage in and did engage in a scheme to unlawfully fail to comply, with ISO dispatch instructions to produce energy out of Ancillary Services capacity sold to the ISO as operating reserves;

d. In addition, defendants violated their agreements, and conspired to engage in and did engage in a scheme to violate their agreements, to keep said Ancillary Services capacity unloaded and available. On thousands of occasions defendants failed to comply with their obligations by (1) causing the same capacity to be sold again as energy into the real-time market, and/or (2) failing to provide the committed Ancillary Services capacity altogether;

e. In addition, defendants accepted payments, and conspired to engage in and did engage in a scheme to accept payments, for Ancillary Services that they did not and could no provide, and unlawfully failed to notify the ISO that settlements errors had been made in their favor; and

f. In addition, defendants accepted payments, and conspired to engage in and did engage in a scheme to accept payments, for energy capacity that they unlawfully sold into the real-time market, even though they had no ownership interest in that energy, having sold the underlying capacity to the ISO as Ancillary Services.

62. From on or about September 10, 2000 to the present, defendants, and each of them have engaged and continue to engage in unlawful, unfair, or fraudulent business acts or practices, which include, but are not limited to, the following:

a. Defendants have failed to honor their Ancillary Services agreements and have conspired to engage in, and have engaged in, a scheme to fail to honor their Ancillary Services capacity bids, despite the implementation of No Pay, by (1) using the same energy capacity that they had sold to the ISO in the form of Ancillary Services to generate electricity to sell a second time into the real-time market, in the absence of a dispatch instruction, and/or (2) failing to comply with ISO dispatch instructions directing them to produce energy out of committed Ancillary Services capacity;

b. In addition, defendants submitted, and conspired to engage in and did engage in a scheme to submit bids to provide Ancillary Services on behalf of the participating generators, MIRANT DELTA and MIRANT POTRERO, by falsely and misleadingly warranting to the ISO that the underlying Ancillary Services capacity committed would remain available and unloaded as required by law and that they would comply with the ISO's dispatch instructions;

c. In addition, defendants violated their agreements, and conspired to engage in and did engage in a scheme to violate their agreements, to keep said Ancillary Services capacity; unloaded and available. Defendants failed to comply with their obligations by (1) causing the same capacity to be sold again into the real-time market, and/or (2) failing to provide the committed Ancillary Services capacity altogether.

63. As a result of the conduct alleged above, defendants, through their SC, MIRANT AMERICAS ENERGY MARKETING, unlawfully and unfairly collected millions of dollars in payments for Ancillary Services they did not

provide, and for energy sold into the real-time market that was legally required to be held in reserve, in specific amounts to be subject to proof a trial.

64. As a further result of the conduct alleged above, the ISO has faced and continues to face serious threats to system reliability because operating reserves it was relying on to maintain the reliability of the transmission grid were not available. In many instances, after discovering that defendants had failed to honor their Ancillary Services bids, the ISO was required to purchase emergency supplies of electricity at prices much higher than normal to keep the system in balance. Further, because it could not rely on defendants to honor their obligations, the ISO was required to procure greater amounts of Ancillary Services than it normally would have needed to meat its reserve requirements, which put upward pressure on the market clearing prices for Ancillary Services.

65. As a further result of the conduct alleged above, the ISO has incurred substantial costs for services never received. Those costs have been borne by the utilities, who act as intermediaries to provide consumers and businesses with electricity, and by California's ratepayers and taxpayers. The magnitude of the incremental costs incurred by the ISO to safely and reliably operate the system in the face of said conduct will be subject to proof at trial.

66. As a further result of the conduct alleged above, the ISO and its market participant: have incurred substantial penalties from various market-monitoring entities, including the WSCC.

67. Defendants' continuing wrongful conduct, as alleged above, unless and until restrained by an Order of this Court, will further cause great and irreparable harm

to the safety and reliability of the California electricity market and to California's ratepayers and taxpayers.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For a preliminary and permanent injunction, as authorized by Cal. Bus. & Prof. Code § 17203, enjoining defendants, and each of them, their successors, agents, representatives, employees and all persons acting in concert with them, from engaging in unfair competition as defined in Cal. Bus. & Prof. Code § 17200, including, but not limited to the types of acts or practices alleged herein;

2. For an order directing defendants to pay restitution in an amount according to proof;

3. For an order directing defendants to disgorge all monies, including any profits, they gained as a result of their violations of Cal. Bus. & Prof. Code § 17200 in an amount according to proof;

4. For an order assessing civil penalties of two thousand five hundred dollars ($2,500) against each defendant for each violation of Cal. Bus. & Prof. Code § 17200, as authorized by Cal. Bus. & Prof. Code § 17206, in an amount according to proof;

5. For costs of suit incurred herein; and

6. For such other and further relief as the nature of the case may require and the Court deems just and proper.

Dated: 3-11-02

Respectfully submitted,

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Attorney General of the
State of California
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Chief Deputy Attorney
General
RICHARD FRANK
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By: /s/ Pamela Merchant
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA ex rel. BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Plaintiffs, v. DYNEGY, INC.; DYNEGY POWER MARKETING, INC.; NRG ENERGY, INC.; XCEL ENERGY, INC.; WEST COAST POWER, L.L.C.; CABRILLO POWER I, L.L.C.; CABRILLO POWER II, L.L.C.; EL SEGUNDO POWER, L.L.C.; LONG BEACH GENERATION, L.L.C.; and DOES 1-1100, Defendants.	Case No.: C 02 1854 **NOTICE OF REMOVAL BY ALL DEFENDANTS** (Filed Apr. 17, 2002)

All defendants *in People of the State of California ex rel. Bill Lockyer, Attorney General of the State of California v. Dynegy,* filed as case No. CGC-02-405433 in the Superior Court of the State of California in and for the County of San Francisco, hereby give notice that this case is removed to the United States District Court for the Northern District of California pursuant to 28 U.S.C. §§ 1441 and 1446. Copies of the Summonses, Acknowledgment of Receipt, and Complaint are attached hereto as Exhibit 1. A copy of the Notice of Related Case is attached as Exhibit 2; there have been no other pleadings or orders. The earliest date for service on any defendant was March 29, 2002. This Notice is timely as to all defendants under 28 U.S.C. § 1446(b). NRG Energy, Inc. files this Notice, but Xcel Energy, Inc., Dynegy, Inc., Dynegy Power Marketing, Inc., West Coast Power, L.L.C.; Cabrillo Power I, L.L.C.; Cabrillo Power II, L.L.C.; El Segundo Power, L.L.C.; and Long Beach Generation, L.L.C. all consent to removal and join this Notice.

A short and plain statement of the grounds for removal follows:

1. This is a civil action of which this Court has original jurisdiction under section 317 of the Federal Power Act, 16 U.S.C. § 825p. That section gives the federal district courts "exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of [the Federal Power Act, 16 U.S.C. § 824 *et seq.*] or any rule, regulation or order thereunder."

2. Plaintiffs complaint alleges "a scheme to violate the rules of the ISO market. . . ." Complaint, ¶ 1. The only "rules" pled are established "by a Tariff and Protocols (the

'ISO Tariff') on file with and approved by the Federal Energy Regulatory Commission ('FERC')." Complaint, ¶ 30. Plaintiff also alleges that FERC issued an order in February, 1999 approving an Amendment to the Tariff governing the conduct alleged, Complaint ¶ 57, and that conduct violating the FERC-approved Amendment nonetheless continues. Complaint ¶ 60. The complaint therefore is a suit "brought to enforce" a "liability or duty created by . . . a rule, regulation or order" under the Federal Power Act within the meaning of § 825p.

3. Plaintiff has "artfully pled" alleged ISO Tariff violations as a state law claim by relying on those alleged ISO Tariff violations as predicates to a California Business & Professions Code § 17200 claim for "unlawful, unfair or fraudulent business" practices. This attempt to engraft a state remedy on alleged violations of a federal tariff does not change the fact that the claim is "necessarily federal in character." *See ARCO v. Dept of Hlth. & Envir.,* 213 F.3d 1108, 1114 (9th Cir. 2000) (describing three alternative bases for federal removal jurisdiction of claims pled as state law matters). Thus, the Ninth Circuit approved the removal of a case pleading only state law claims arising from alleged violations of NASD rules, holding that federal jurisdiction was properly based on a provision of the Securities Exchange Act with wording identical to § 825p: "Because Sparta's complaint sought relief based upon violation of exchange rules, subject matter jurisdiction was specifically vested in the federal district court under the Exchange Act. . . . 15 U.S.C. § 78aa." *Sparta Surgical v. Nat'l Ass'n of Sec. Dealers,* 159 F.3d 1209 (9th Cir. 1998). The complaint as a whole is removable under 28 U.S.C. § 1441(a) and (b) as an attempted "artful pleading" in state law terms of claims which are necessarily federal.

4. Alternatively, this Court also has original jurisdiction under 28 U.S.C. § 1331, which gives the federal district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."

5. As noted, the complaint alleges violations of ISO market rules established by federal tariff. The ISO Tariff is explicitly referenced in the paragraphs of the complaint describing the Ancillary Service obligations on which the complaint entirely relies (¶¶ 44, 45, 49, 50). The allegations in paragraphs 56-60 with respect to Amendment 13 to the ISO Tariff also describe rights and obligations that the complaint alleges flow from the ISO Tariff. Thus, the complaint alleges breach of the tariff or a denial of rights created solely by the tariff as the core of the conduct complained of.

6. "[F]ederal tariffs are the law, not mere contracts." *Marcus v. AT&T Corp.,* 138 F.3d 46, 56 (2d Cir. 1998), quoting with approval *MCI Telecommunications Corp. v. Garden State Inv. Corp.,* 981 F.2d 385, 387 (8th Cir. 1992). This principle applies equally to tariffs filed with FERC. "[A] rate filed with the Commission has the force of law. . . ." *Maine Public Serve Co. v. Federal Power Commission,* 579 F.2d 659, 666 (1st Cir. 1978); *accord, Indeck Maine Energy v. ISO New England,* 167 F. Supp. 2d 675, 688 (D. Del. 2001) (noting the "similarity between telephone and utility regulation"). Since the complaint seeks to enforce "a federally approved tariff in the guise of a state" claim, it "arises under federal law." *Indeck*, 167 F. Supp. 2d at 690.

7. In the further alternative, insofar as any part of plaintiff's claim might be treated as a state law claim, this Court would have jurisdiction under 28 U.S.C. § 1367(a).

The complaint pleads only a single, "necessarily federal" claim. In this regard, the complaint is unlike those considered in *Hendricks v. Dynegy Power Marketing, Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001), where the court found that plaintiffs could, for purposes of analyzing removal issues, state a violation of Section 17200 independent of a violation of the Federal Power Act. 160 F. Supp. 2d at 1164. Here, by contrast, the Attorney General does not state a violation of Section 17200 independent of the tariff approved by FERC under the FPA, and has brought a suit to enforce a duty created by a rule or regulation under the FPA within the meaning of 16 U.S.C. § 825p.

8. Nonetheless, 28 U.S.C. § 1367(a) gives a federal district court "supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy. . . ." All parts of the single claim alleged in the complaint present one case or controversy within the meaning of 28 U.S.C. § 1367(a). Accordingly, this Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) over any part of the claim asserted in the complaint as to which this court might be deemed to lack independent federal jurisdiction. For this reason] also, the case is removable under 28 U.S.C. § 1441(a) and (b).

9. Removal is not defeated by the Eleventh Amendment. *California v. Acme Fill Corp.*, 1999 WL 685254 (N. D. Cal. 1997). Defendants do not waive any objections or defenses they may have by filing this Removal Notice. *See Clark v. Wells*, 203 U.S. 164 (1906).

DATED: April 17, 2002

SHEPPARD, MULLIN,
RICHTER & HAMPTON LLP
CARLTON A. VARNER
JAMES MCGINNIS
TIMOTHY B. TAYLOR
ANDREA B. HASEGAWA

By /s/ Tim B. Taylor for
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Signed on Behalf of All Defendants

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

People of the State of California *ex rel.* Bill Lockyer, Attorney General of the State of California, Plaintiff, v. Reliant Energy, Inc; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Resources Inc.; Reliant Energy Coolwater, L.L.C.; Reliant Energy Ellwood, L.L.C., Reliant	No. C 02 1791 NOTICE OF REMOVAL BY ALL DEFENDANTS (Filed April 15, 2002)

Energy Etiwanda, L.L.C.; Reliant Energy Mandalay, L.L.C.; Reliant Energy Ormond Beach, L.L.C.; and Does 1-100,

Defendants.

All defendants[1] in *People of the State of California ex rel. Bill Lockyer, Attorney General of the State of California v. Reliant Energy Inc., et al.,* filed as case No. CGC-02-405435 in the Superior Court of the State of California in and for the County of San Francisco, give notice that this case is removed to the United States District Court for the Northern District of California pursuant to 28 U.S.C. §§ 1441 and 1446.

Compliance with Statutory Requirement

1. In accordance with 28 U.S.C. § 1446(a) attached as Exhibit A is a true and correct copy of the Complaint. Attached as Exhibit B are true and correct copies of the Civil Cover Sheets and Summonses served on the Defendants.[2] There have been no other pleadings or orders. The

[1] Reliant Energy, Inc., Reliant Energy Services, Inc., Reliant Energy Power Generation, Inc., Reliant Resources Inc., Reliant Energy Coolwater, Inc (erroneously sued under its former name, Reliant Energy Coolwater L.L.C.), Reliant Energy Ellwood, Inc. (erroneously sued under its former name, Reliant Energy Ellwood, L.L.C.), Reliant Energy Etiwanda, Inc. (erroneously sued under its former name, Reliant Energy Etiwanda, L.L.C.), Reliant Energy Mandalay, Inc. (erroneously sued under its former name, Reliant Energy Mandalay, L.L.C.), and Reliant Energy Ormond Beach, Inc. (erroneously sued under its former name, Reliant Energy Ormond Beach, L.L.C.). All other "defendants" referred to in the state court complaint are unidentified "Does."

[2] Eight defendants, Reliant Energy Services, Inc, Reliant Energy Power Generation, Inc., Reliant Resources Inc., Reliant Energy

(Continued on following page)

earliest date for service on any Defendant was March 21, 2001. This Notice is timely as to all defendants under 28 U.S.C. § 1446(b).

2. Pursuant to 28 U.S.C. § 1446(d), Defendants will promptly provide written notice of removal of this action to plaintiff and will promptly file a copy of this Notice of Removal with the Clerk of the Superior Court of California in and for the County of San Francisco.

Intradistrict Assignment

3. Plaintiff filed this case in the Superior Court of California, County of San Francisco. Therefore, the San Francisco Division of the Northern District of California is the proper location to which this case should be removed. Local Rules 3-2(c), (d), 3-5(b).

Statement of the Grounds for Removal

4. This is a civil action of which this Court has original jurisdiction under section 317 of the Federal

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Coolwater, Inc (erroneously sued under its former name, Reliant Energy Coolwater L.L.C.), Relaint [sic] Energy Ellwood, Inc. (erroneously sued under its former name, Reliant Energy Ellwood, L.L.C.), Reliant Energy Etiwanda, Inc. (erroneously sued under its former name, Reliant Energy Etiwanda, L.L.C.), Reliant Energy Mandalay, Inc. (erroneously sued under its former name, Reliant Energy Mandalay, L.L.C.), and Reliant Energy Ormond Beach, Inc. (erroneously sued under its former name, Reliant Energy Ormond Beach, L.L.C.) were served on April 1, 2002, pursuant to California Code of Civil Procedure § 415.30. Reliant Energy, Inc. was served with the Complaint by certified mail postmarked March 11, 2002. Service by certified mail was complete on March 21, 2001. California Code of Civil Procedure § 415.40; *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 348 (1999).

Power Act, 16 U.S.C. § 825p. That section gives the federal district courts "exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of [the Federal Power Act, 16 U.S.C. § 824 *et seq.*] or any rule, regulation or order thereunder."

5. Plaintiff's Complaint alleges "a scheme to violate the rules of the ISO market . . ." Complaint, ¶ 1. The only "rules" pled are established "by a Tariff and Protocols (the 'ISO Tariff') on file with and approved by the Federal Energy Regulatory Commission ('FERC')." Complaint, ¶ 30. Plaintiff also alleges that FERC issued an order in February, 1999 approving an Amendment to the Tariff governing the conduct alleged, Complaint ¶ 57, and that conduct violating the FERC approved Amendment nonetheless continues. Complaint ¶ 60. The complaint therefore is a suit "brought to enforce" a "liability or duty created by . . . a rule, regulation or order" under the Federal Power Act within the meaning of § 825p.

6. Plaintiff has "artfully pled" alleged ISO Tariff violations as a state law claim by relying on those alleged ISO Tariff violations, and on alleged duties arising from the ISO Tariff, as predicates to a California Business & Professions Code § 17200 claim for "unlawful, unfair or fraudulent business" practices. This attempt to engraft a state remedy on alleged violations of a federal tariff does not change the fact that the claim is "necessarily federal in character." *See ARCO v. Dept. of Hlth & Envir,* 213 F.3d 1108, 1114 (9th Cir. 2000) (describing three alternative bases for federal removal jurisdiction of claims pled as state law matters). Thus, the Ninth Circuit approved the removal of a case pleading only state law claims arising from alleged violations of NASD rules, holding that federal

jurisdiction was properly based on a provision of the Securities Exchange Act with wording identical to § 825p: "Because Sparta's complaint sought relief based upon violation of exchange rules, subject matter jurisdiction was specifically vested in the federal district court under the Exchange Act. . . . 15 U.S.C. § 78aa." *Sparta Surgical v. Nat'l Ass'n of Sec. Dealers,* 159 F.3d 1209 (9th Cir. 1998). The Complaint as a whole is removable under 28 U.S.C. § 1441(a) and (b) as an attempted "artful pleading" in state law terms of claims which are necessarily federal.

7. Alternatively, this Court also has original jurisdiction under 28 U.S.C. § 1331, which gives the federal district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."

8. As noted, the Complaint alleges violations of ISO market rules established by federal tariff. The ISO Tariff is explicitly referenced in the paragraphs of the complaint describing the Ancillary Service obligations on which the complaint entirely relies (¶¶ 44, 45, 49, 50). The allegations in paragraphs 56-60 with respect to Amendment 13 to the ISO Tariff also describe rights and obligations that the Complaint alleges flow from the ISO Tariff. Thus, the Complaint alleges breach of the tariff or a denial of rights and duties created solely by the tariff as the core of the conduct complained of.

9. "[F]ederal tariffs are the law, not mere contracts." *Marcus v. AT&T Corp.,* 138 F.3d 46, 56 (2d Cir, 1998), quoting with approval *MCI Telecommunications Corp. v. Garden State Inv. Corp.,* 981 F.2d 385, 387 (8th Cir. 1992). This principle applies equally to tariffs filed with FERC. "[A] rate filed with the Commission has the force of law. . . ." *Maine Public Serv. Co. v. Federal Power Commission,* 579 F.2d 659, 666 (1st Cir. 1978); *accord, Indeck*

Maine Energy v. ISO New England, 167 F. Supp. 2d 675, 688 (D. Del. 2001) (noting the "similarity between telephone and utility regulation"). Since the Complaint seeks to enforce "a federally approved tariff in the guise of a state" claim, it "arises under federal law." *Indeck,* 167 F.Supp. 2d at 690.

10. The Complaint pleads only a single, "necessarily federal" claim that relies on the federal ISO Tariff to establish the duties and violations pled as a basis for state remedies. In this regard, the Complaint is unlike those considered in *Hendricks v. Dynegy Power Marketing, Inc.,* 160 F. Supp. 2d 1155 (S.D. Cal. 2001). There the court was confronted with a series of complaints alleging various state claims, including claims under the California Cartwright Act. The court there concluded that the state claims could be resolved without reference to the pertinent "just and reasonable" rate standard in federal law. 160 F. Supp. 2d at 1162-63. Here unless plaintiff shows a violation of the federal tariff or breach of a duty imposed by that tariff, he has no state claim.

11. In the further alternative, insofar as any part of plaintiffs claim might be treated as a state law claim, this Court would have jurisdiction under 28 U.S.C. § 1367(a). That section gives a federal district court "supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy. . . ." All parts of the single claim alleged in the Complaint present one case or controversy within the meaning of 28 U.S.C. § 1367(a). Accordingly, this Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) over any part of the claim asserted in the complaint as to which this court might be deemed to lack independent

federal jurisdiction. For this reason also, the case is removable under 28 U.S.C. § 1441(a) and (b).

12. By removing this case, Defendants do not waive and are not estopped from raising any defenses that were available to them in state court. *See Clark v. Wells,* 203 U.S. 164 (1906); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993).

WHEREFORE, pursuant to 28 U.S.C. §§ 1331, 1441, 1446, and 16 U.S.C. § 825p, defendants removes [sic] this case from the Superior Court of the State of California in and for the County of San Francisco to the United States District Court for the Northern District of California, San Francisco Division.

DATED: April 15, 2002

McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

By: /s/ Terry J. Houlihan
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Plaintiffs, v. MIRANT CORPORATION; MIRANT CALIFORNIA, L.L.C., MIRANT DELTA, L.L.C.; MIRANT POTRERO, L.L.C.; MIRANT AMERICAS ENERGY MARKETING, L.P.; MIRANT CALIFORNIA INVESTMENTS, INC.; MIRANT AMERICAS, INC.; SOUTHERN ENERGY	C 02-1914 **NOTICE OF REMOVAL BY ALL DEFENDANTS** (Filed Apr. 18, 2002)

GOLDEN STATES HOLDINGS, INC.; and DOES 1-100;

Defendants.

All defendants in *People of the State of California ex rel. Bill Lockyer, Attorney General of the State of California v. Mirant Corporation, et al.,* filed as case No. CGC-02-4054-29 in the Superior Court of the State of California in and for the County of San Francisco, hereby give notice that this case is removed to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441 and 1446. Copies of the Summonses and Complaint are attached hereto as Exhibit A. The Notice of Related Case is attached as Exhibit B.; there have been no other pleadings or orders. This Notice is timely as to all defendants under 28 U.S.C. § 1446(b). Mirant Corporation files this Notice on behalf of itself and Mirant California, L.L.C.; Mirant Delta, L.L.C.; Mirant Potrero, L.L.C.; Mirant Americas Energy Marketing, L.P.; Mirant California Investments, Inc.; and Mirant Americas, Inc. Southern Energy Golden States Holding, Inc. has been merged into Mirant California Investments, Inc. A short and plain statement of the grounds for removal follows:

1. This is a civil action of which this Court has original jurisdiction under section 317 of the Federal Power Act, 16 U.S.C. § 825p. That section gives the federal district courts "exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of [the Federal Power Act, 16 U.S.C. § 824 et seq.] or any rule, regulation or order thereunder."

2. Plaintiff's complaint all eges [sic] "a scheme to violate the rules of the ISO market. . . ." Complaint, 1. The only "rules" pled are established "by a Tariff and Protocols (the 'ISO Tariff') on file with and approved by the Federal Energy Regulatory Commission ('FERC')." Complaint, 30. Plaintiff also alleges that FERC issued an order in February, 1999 approving an Amendment to the Tariff governing the conduct alleged, Complaint 53, and that conduct violating the FERC approved Amendment nonetheless continues. Complaint 61. The complaint therefore is a suit "brought to enforce" a "liability or duly created by . . . a rule, regulation or order" under the Federal Power Act within the meaning of § 825p.

3. Plaintiff has "artfully pled" alleged ISO Tariff violations as a state law claim by relying on those alleged ISO Tariff violations as predicates to a California Business & Professions Code § 17200 claim for "unlawful, unfair or fraudulent business" practices. This attempt to engraft a state remedy on alleged violations of a federal tariff does not change the fact that the claim is "necessarily federal in character." *See ARCO v. Dept of Hlth & Envir.* 213 F.3d 1108, 1114 (9th Cir. 2000) (describing three alternative bases for federal removal jurisdiction of claims pled as state law matters). Thus, the Ninth Circuit approved the removal of a case pleading only state law claims arising from alleged violations of NASD rules, holding that federal jurisdiction was properly based on a provision of the Securities Exchange Act with wording identical to § 825p: "Because Sparta's complaint sought relief based upon violation of exchange rules, subject matter jurisdiction was specifically vested in the federal district court under the Exchange Act. . . . 15 U.S.C. § 78aa" *Sparta Surgical v. Nat'l Ass'n of Sec. Dealers,* 159 F.3d 1209 (9th Cir. 1998).

The complaint as a whole is removable under 28 U.S.C. § 1441(a) and (b) as an attempted "artful pleading" in state law terms of claims which are necessarily federal.

4. Alternatively, this Court also has original jurisdiction under 28 U.S.C. § 1331, which gives the federal district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."

5. Moreover, the state law claims alleged require the resolution of a substantial federal question because they require a determination whether existing or proposed practices are "just and reasonable" within the meaning of the Federal Power Act. *See* 16 USC §§ 824d & 824e.

6. As noted, the complaint alleges violations of ISO market rules established by federal tariff. The ISO Tariff is explicitly referenced in the paragraphs of the complaint describing the Ancillary Service obligations on which the complaint entirely relies (36, 39, 40, 45 50). The allegations in paragraphs 52-56 with respect to Amendment 13 to the ISO Tariff also describe rights and obligations that the complaint alleges flow from the ISO Tariff. Thus, the complaint alleges breach of the tariff or a denial of rights created solely by the tariff as the core of the conduct complained of.

7. "[F]ederal tariffs are the law, not mere contracts." *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998), quoting with approval *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992). This principle applies equally to tariffs filed with FERC. "[A] rate filed with the Commission has the force of law. . . ." *Maine Public Serv. Co. v. Federal Power Commission,* 579 F.2d 659, 666 (1st Cir. 1978); *accord, Indeck Maine Energy v. ISO New England,* 167 F. Supp. 2d 675,

688 (D. Del. 2001) (noting the "similarity between telephone and utility regulation"). Since the complaint seeks to enforce "a federally approved tariff in the guise of a state" claim, it "arises under federal law." *Indeck,* 167 F.Supp. 2d at 690.

8. In the further alternative, insofar as any part of plaintiff's claim might be treated as a state law claim, this Court would have jurisdiction under 28 U.S.C. § 1367(a). The complaint pleads only a single, "necessarily federal" claim. In this regard, the complaint is unlike those considered in *Hendricks v. Dynegy Power Marketing. Inc., et al.,* 160 F. Supp. 2d 1155 (S.D. Cal. 2001) for a variety of reasons. For example, the *Hendricks* court found that plaintiffs could, for purposes of analyzing removal issues, state a violation of California Business and Professions Code section 17200 independent of a violation of the Federal Power Act. 160 F. Supp. 2d at 1164. Here, by contrast, the Attorney General does not plead a violation of Section 17200 independent of the tariff approved by FERC under the FPA – the Attorney General's action directly enforces a duty created by a rule or regulation under the FPA within the meaning of 16 U.S. C. 825p.

9. Nonetheless, 28 U.S.C. § 1367(a) gives a federal district court "supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy. . . . " All parts of the single claim alleged in the complaint present one case or controversy within the meaning of 28 U.S.C. § 1367(a). Accordingly, this Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) over any part of the claim asserted in the complaint as to which this court might be deemed to lack

independent federal jurisdiction. For this reason also, the case is removable under 28 U.S.C. § 1441(a) and (b)

Removal is not defeated by the Eleventh Amendment. *California v. Acme Fill Corp.,* 1999 WL 685254 (N. D. Cal. 1997). Defendants do not waive any objections or defenses they may have by filing this Removal Notice. *See Clark v. Wells,* 203 U.S. 164 (1906).

Dated: April 18, 2002

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No. 04-1028

Supreme Court, U.S.
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MAR 16 2005
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In The Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. BILL LOCKYER, ATTORNEY GENERAL,

Petitioner,

v.

DYNEGY, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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CORPORATE DISCLOSURE STATEMENTS

[Case No. 04-1028]

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

Respondent Dynegy Inc. is a publicly traded company in which Chevron USA Inc. owns a minority interest in excess of 10 percent; Chevron USA Inc. is a wholly-owned subsidiary of ChevronTexaco Corporation, a publicly traded company; Dynegy Power Marketing Inc. is, through intermediate holding companies, a wholly owned subsidiary of Dynegy, Inc.; West Coast Power LLC is owned (through intermediate holding companies) 50 percent by Dynegy, Inc. and 50 percent by NRG Energy Inc.; Cabrillo Power I, LLC, Cabrillo Power II, LLC, El Segundo Power LLC, and Long Beach Generation LLC, are all owned by West Coast Power LLC.

Respondent Reliant Energy, Inc. is a publicly traded corporation; no publicly held corporation owns 10 percent or more of the stock of Reliant Energy, Inc.; Reliant Energy Services, Inc. is a wholly-owned subsidiary of Reliant Energy, Inc.; Reliant Energy Power Generation, Inc. is also a wholly-owned subsidiary of Reliant Energy, Inc; Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc. are wholly-owned subsidiaries of Reliant Energy California Holdings, LLC, which is a wholly-owned subsidiary of Reliant Energy Power Generation, Inc.

CORPORATE DISCLOSURE STATEMENTS – Continued

Respondent Mirant Corporation* is a publicly held company in bankruptcy. No publicly held corporation owns more than 10 percent of the stock of Mirant Corporation. Mirant Corporation is the corporate parent of Mirant Americas, Inc.; Mirant California Investments, Inc. and Mirant Americas Energy Marketing Investments, Inc. are subsidiaries of Mirant Americas Generation, LLC, which is a subsidiary of Mirant Americas, Inc.; Mirant Delta, LLC and Mirant Potrero, LLC are subsidiaries of Mirant California, LLC, which is a subsidiary of Mirant California Investments, Inc.; Mirant Americas Energy Marketing, LP is a subsidiary of Mirant Americas Energy Marketing Investments, Inc.; Southern Energy Golden States Holdings, Inc. is the predecessor corporation of Mirant California Investments, Inc.

Respondent Xcel Energy, Inc. is a publicly held corporation. No publicly held corporation owns 10 percent or more of the stock of Xcel Energy, Inc.; NRG Energy, Inc. is a wholly owned subsidiary of Xcel, Inc.

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* Respondent Mirant Corporation, currently in bankruptcy, is not joining in or filing an opposition.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENTS	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	1
A. The Regulatory Background	1
B. Proceedings Below	5
REASONS FOR DENYING THE PETITION	7
I. The Decision Below, Upholding Removal under a Federal Statute that Unambiguously Confers Jurisdiction in the District Courts, Is Consistent with the Decisions of this Court and the Other Circuits	9
A. The Terms of the Relevant Statutes Establish Jurisdiction In This Case	9
B. No Conflict Exists with Merrell Dow; Removal Here Is Properly Based on a Special Congressional Grant of Jurisdiction Found in the Federal Power Act	11
C. Pan American's Treatment of the Exclusive Jurisdiction Provision of the Natural Gas Act Is Inapposite Here	15
D. Petitioner's State Law Argument About the Scope of California's Unfair Competition Law Counsels Against Granting Certiorari	18
II. The First Question Presented for Review Is Not Presented By This Case	18

TABLE OF CONTENTS – Continued

Page

III. Sovereign Immunity Does Not Bar Removal Where There Is No Claim Against the State 20

A. There Is No Question of First Impression, and this Court Has Consistently Held that Removal Does Not Constitute the Commencement or Prosecution of a Lawsuit Against the State 22

B. The Circuits Are Not Divided 25

C. The Court of Appeals Decision Does Not Expand Removal Jurisdiction or Threaten State Sovereignty..... 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 21, 23

Ames v. State of Kansas, 111 U.S. 449 (1884) 24, 25

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 6

Beneficial National Bank v. Anderson, 539 U.S. 1 (2003) 13

Black v. Cutter Labs., 351 U.S. 292 (1956) 20

California ex rel. Lockyer v. TransCanada Power L.P., 2004 U.S. App. LEXIS 21727 (9th Cir. Oct. 12, 2004) 7

Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 12, 13, 17, 20

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 23

Clark v. Gulf Oil Corp., 570 F.2d 1138 (3d Cir. 1977) 17

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) ....*passim*

College Savings Bank v. Florida Prepaid Post-secondary Education Expense Board, 527 U.S. 666 (1999) 21

D'Alessio v. New York Stock Exchange, Inc., 258 F.3d 93 (2d Cir.), *cert. denied*, 524 U.S. 1066 (2001) 12

Dugan v. Rank, 372 U.S. 609 (1963) 22

Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279 (1973) 28

Entergy Louisiana, Inc. v. Louisiana Public Service Commission, 539 U.S. 39 (2003) 1, 6

TABLE OF AUTHORITIES – Continued

Page

Exxon Corp. v. Hunt, 683 F.2d 69 (3d Cir. 1982) 18

Fairview Township v. EPA, 773 F.2d 517 (3d Cir. 1985) 10

FPC v. Southern California Edison Co., 376 U.S. 205 (1964) 6

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)..... 9, 13, 14, 20

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 28

Gully v. First National Bank in Meridian, 299 U.S. 109 (1936) 13

Hans v. Louisiana, 134 U.S. 1 (1890) 23, 25

Hawkins v. NASD Inc., 149 F.3d 330 (5th Cir. 1998)..... 13

Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22 (5th Cir. 1980)..... 27

Huddleston v. Dwyer, 322 U.S. 232 (1944) 18

Illinois v. City of Milwaukee, 406 U.S. 91 (1972).... 5, 24, 27, 28

In re Rezulin Products Liability Litigation, 133 F. Supp. 2d 272 (S.D.N.Y. 2001) 27

Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) 20

Marcus v. AT&T Corp., 138 F.3d 46 (2nd Cir. 1998)..... 10

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) .....*passim*

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 18

TABLE OF AUTHORITIES – Continued

Page

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) 6

MM&S Financial, Inc. v. NASD, Inc., 364 F.3d 908 (8th Cir. 2004) 13

Moore ex rel. Mississippi v. Abbott Labs., Inc., 900 F. Supp. 26 (S.D.Miss. 1995) 26

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 6

Oklahoma ex rel. Edmondson v. Magnolia Marine Transport Co., 359 F.3d 1237 (10th Cir. 2004) 27

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 11

Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961) 1, 8, 15, 16, 17

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 22

People v. Steelcase, 792 F.Supp. 84 (C.D.Cal. 1992) 26

Powers v. South Central United Food & Commercial Workers Unions & Employers Health & Welfare Trust, 719 F.2d 760 (5th Cir. 1983) 17

Public Utility District Number 1 of Grays Harbor County v. Idacorp Inc., 379 F.3d 641 (9th Cir. 2004) 6, 7, 16

Public Utility District Number 1 of Snohomish County v. Dynegy Power Marketing, Inc., 384 F.3d 756 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3343 (U.S. Nov. 5, 2004) 7

Regents of the University of California v. Eli Lilly & Co., 119 F.3d 1559 (Fed. Cir. 1997) 21, 27

TABLE OF AUTHORITIES – Continued

Page

Regents of the University of Minnesota v. Glaxo Wellcome, Inc., 58 F. Supp. 2d 1036 (D. Minn. 1999) 26, 27

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 6

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) 13

South Dakota State Cement Plant Commission v. Wausau Underwriters Ins. Co., 778 F. Supp. 1515 (D.S.D. 1991) 27

Sparta Surgical Corp. v. National Association of Securities Dealers, 159 F.3d 1209 (9th Cir. 1998) 11, 12, 19

T&E Pastorino Nursery v. Duke Energy Trading & Marketing, LLC, 2005 U.S. App. LEXIS 3315 (9th Cir. Feb. 25, 2005) 7

Thomas v. FAG Bearings Corp., 50 F.3d 502 (1995) 25, 26

Vermont v. Oncor Communications, Inc., 166 F.R.D. 313 (D. Vt. 1996) 27

STATUTES

16 U.S.C. § 824(b) 1

16 U.S.C. § 824e(a) 15

16 U.S.C. § 825l(b) 15

16 U.S.C. § 825p 5, 7, 9, 10, 19

28 U.S.C. § 1331 ..... 5, 9, 11, 19

28 U.S.C. § 1441 ..... 5, 24

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1441(b) 10

California Business & Professions Code § 17200 *et seq.* 5

ADMINISTRATIVE DECISIONS

American Electric Power Service Corp., 103 F.E.R.C. ¶ 61,345 (2003) 2, 3

Dynegy Power Marketing, Inc., 107 F.E.R.C. ¶ 63,039 (2004) 4

Dynegy Power Marketing, Inc., 108 F.E.R.C. ¶ 61,145 (2004) 4

Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, Order Amending Market-Based Rate Tariffs and Authorizations, 105 F.E.R.C. ¶ 61,218 (2003) 4

Reliant Resources, Inc., 106 F.E.R.C. ¶ 61,207 (2004) 3

San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, etc., 93 F.E.R.C. ¶ 61,294 (2000) 4, 5

RULES

SUPREME COURT RULE 10 1

SUPREME COURT RULE 15(2) 19

FEDERAL RULE OF CIVIL PROCEDURE 19(a) 26

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Federalist No. 81 (C. Rossiter ed. 1961) (A. Hamilton)..... 23

INTRODUCTION

The questions stated in the Petition are not worthy of review. They raise none of the issues traditionally guiding this Court's grant of review. *See* S. CT. R. 10. The Court of Appeals faithfully and correctly applied precedent regarding federal removal jurisdiction, consistent with both this Court's and other federal appeals courts' prior decisions. Decisions of this Court and courts of appeals also unanimously confirm that the Eleventh Amendment does not bar removal of a case in which a state is the plaintiff and in which no claim is asserted against it. Review of these pure jurisdictional issues is not warranted where, as here, Petitioner's claims cannot survive on their merits in any court, state or federal. Petitioner's failure to challenge the dismissal on the merits concedes the futility of this Petition.

STATEMENT OF THE CASE

A. The Regulatory Background

As this Court observed in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 41 (2003) ("*Entergy*"): "The Federal Energy Regulatory Commission (FERC) regulates the sale of electricity at wholesale in interstate commerce. 16 U.S.C. § 824(b)." Historically, FERC exercised this regulatory jurisdiction by requiring the filing of tariffs containing cost-based rate schedules. But as the Court of Appeals explained:

> [In 1996] . . . the California Legislature decided that reshaping the market for California energy could help provide competitive, lower cost and reliable electric service, while preserving the state's commitment to developing diverse, environmentally sensitive electricity resources. . . . That legislation formed two non-governmental entities to orchestrate the transmission and sale of electricity:

> the Independent System Operator ("ISO") and the Independent Power Exchange ("PX"). . . .

Pet. App. at 5a. Both the ISO and PX were subject to the jurisdiction of the FERC. *Id.* at 6a.

FERC authorized this restructuring in a series of orders approving tariffs filed by the PX and ISO. The tariffs set out in literally voluminous detail the rules for operating in the California wholesale electricity markets. FERC also and separately approved market participants' individual tariffs providing for sales at market-based prices. Under the ISO tariff, "ancillary services" agreements were contracts with the ISO to keep power in reserve, available for delivery in response to uncertain electric supply shortages. *Id.* The Respondent generators and marketers participated in the ISO ancillary services market pursuant to the ISO's "tariff on file with and approved by FERC. . . ." *Id.* at 7a. For the Ancillary Services at issue here, bids would be submitted to the ISO according to its tariff. The ISO tariff also detailed other terms for the sale of Ancillary Services. Thus, "the conduct the state [seeks] to condemn was expressly governed by the ISO tariffs." *Id.* at 14a. The tariff "obligates the generators to maintain specified reserve capacity in the ancillary service market and . . . details penalties and remedies for non-compliance." *Id.* at 13a-14a. In short, "the tariffs here directly implicate the federal regulatory regime, were filed with FERC, and concern obligations directly and exclusively arising under regulations issued pursuant to the FPA [Federal Power Act]." *Id.* at 22a.

FERC has been actively exercising its jurisdiction over the precise conduct alleged in Petitioner's complaint. In *American Electric Power Service Corp.*, FERC issued an "Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior" which examined the transactions of 43

sellers of energy and ancillary services, including certain Respondents in this action. 103 F.E.R.C. ¶ 61,345 (2003). In this broad proceeding, FERC investigated whether certain transactions were in violation of the ISO and PX tariffs during the period of January 1, 2000 to June 20, 2001, and whether they warranted a monetary remedy of disgorgement of unjust profits or other non-monetary remedies. Among the various types of behavior FERC investigated were allegations of "Double Selling," which involved selling ancillary services in the day-ahead market, but later selling those same resources as energy in the hour-ahead or real-time markets. *Id.* at P. 50. The same alleged conduct is at the center of Petitioner's complaint. Pet. App. at 133a, 148a, 152a-153a.

FERC settled the Double Selling claims against certain Respondents with significant participation by Petitioner. For example, on March 4, 2004, FERC approved a settlement with the Respondent Reliant parties. *Reliant Resources, Inc.*, 106 F.E.R.C. ¶ 61,207 (2004). Reliant did not admit to any tariff violation but paid $836,000, which was the total *revenues* (not profits) potentially received by Reliant from the alleged Double Selling of ancillary services. *Reliant Resources, Inc.*, Docket No. EL03-170-000, "Certification of Contested Settlement," December 9, 2003 at P. 26. Significantly, this sum was derived from an analysis filed with FERC by the "California Parties," who include Petitioner, which purported to quantify the ancillary services they alleged Reliant had "double-sold." *Id.* at P. 53. The settlement accepted *arguendo* the California Parties' allegations, and Reliant's payment included all revenues it received assuming the validity of their analysis. *Id.*

On August 5, 2004, FERC similarly approved a settlement with the Respondent Dynegy parties, in which Dynegy did not admit to any tariff violation but paid $3,017,416 to resolve the matter. *Dynegy Power Mktg., Inc.*, 108 F.E.R.C. ¶ 61,145 (2004). This sum also was derived by assuming the validity of an analysis filed by the California Parties – including Petitioner – which purported to quantify the ancillary services Dynegy allegedly "double-sold," and the sum comprised all revenues Dynegy received, accepting this analysis. *Dynegy Power Mktg., Inc.*, 107 F.E.R.C. ¶ 63,039 at P. 58 (2004).

On January 31, 2005, Respondent Mirant, along with Petitioner and the other California Parties, submitted a "Joint Offer of Settlement" to FERC, which would resolve those parties' disputes in numerous proceedings pending before FERC, including those concerning the ancillary services allegations that are the subject of Petitioner's complaint. *San Diego Gas & Elec. Co.*, "Joint Offer of Settlement," Docket No. EL00-95 et al., January 31, 2005. The settlement includes a payment that does not separate out a specific amount for Ancillary Services. *Id.* at 4. Final FERC approval of this settlement is pending.

FERC has also issued detailed rules to govern market behavior in wholesale electricity markets, incorporating those rules in all existing market-based rate tariffs. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, Order Amending Market-Based Rate Tariffs and Authorizations, 105 F.E.R.C. ¶ 61,218 (2003).[1]

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[1] FERC has also been actively exercising its jurisdiction over other aspects of the California wholesale electricity market. The Commission is addressing these issues in several proceedings, including the multifaceted docket captioned *San Diego Gas & Electric Co. v. Sellers of*

(Continued on following page)

B. Proceedings Below

Petitioner filed civil complaints in state court against Respondents, companies generating electric power for sale at wholesale in California. The complaints at issue allege that Respondents violated California's Unfair Competition Law (California Business & Professions Code § 17200 *et seq.*) through unlawful, unfair, or fraudulent activity aimed at manipulating the wholesale electricity market, a market regulated exclusively by FERC. Petitioner complained that Respondents participated in "a scheme to violate the rules of the ISO [Independent System Operator] market." Pet. App. at 133a. Respondents removed the case to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441, 16 U.S.C. § 825p (Federal Power Act), and 28 U.S.C. § 1331, and Petitioner moved to remand.

The district court denied remand in a thorough unpublished order, (Pet. App. at 44a, 59a), finding jurisdiction under Section 825p and applying this Court's decision in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), on the

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Energy and Ancillary Services, etc. ("*SDG&E v. Sellers*"). In a series of decisions in that proceeding, which FERC aptly calls the "California Refund Proceeding," FERC has acted to remedy potential flaws in the California market structure, and has provided for the calculation of refunds for charges determined to exceed the just and reasonable level. *See SDG&E v. Sellers*, Order Directing Remedies for California Wholesale Electric Markets, 93 F.E.R.C. ¶ 61,294 (Dec. 15, 2000); *id.*, Order Directing Sellers to Provide Refunds of Excess Amounts Charged for Certain Electric Energy Sales, etc., 94 F.E.R.C. ¶ 61,245 (Mar. 9, 2001); *id.*, Order Establishing Evidentiary Hearing Procedures, Granting Rehearing in Part, and Denying Rehearing in Part, 96 F.E.R.C. ¶ 61,120 (July 25, 2001); *id.*, Order on Proposed Findings on Refund Liability, 102 F.E.R.C. ¶ 61,317 (Mar. 26, 2003); *id.*, Order on Rehearing, 105 F.E.R.C. ¶ 61,066 (Oct. 16, 2003); *id.*, Order on Requests for Rehearing and Clarification, 107 F.E.R.C. ¶ 61,165 (May 12, 2004).

Eleventh Amendment issues. *See* Pet. App. at 52a, 55a-56a, 58a-59a. In a subsequent decision, the district judge dismissed Petitioner's case on preemption and filed-rate grounds. Pet. App. at 61a, 83a, 86a, 92a. He ruled that the FPA preempts state law regulation of wholesale electricity markets, whether through litigation or other means. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). *See* Pet. App. at 81a-84a, 86a. In addition to field and conflict preemption, the district court relied, as an alternative basis for its dismissal ruling, on the filed rate doctrine as discussed in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), and most recently reaffirmed in *Entergy*, 539 U.S. at 47. Pet. App. at 88a-89a.

The Court of Appeals unanimously upheld the denial of remand. It concluded that Petitioner, though purportedly relying on state law for his cause of action, pleaded a claim that "was a naked attempt to enforce these [FERC-governed] federal obligations." Pet. App. at 22a. Further, the court held that the sovereign immunity *defense* does not bar removal when the state itself is pursuing the claim. *Id.* at 32a-33a.

The Court of Appeals also affirmed dismissal on field preemption and filed rate grounds.[2] Pet. App. at 41a n.23, 42a. Other panels of the Ninth Circuit have since applied similar reasoning to uphold dismissals of state law claims. *Pub. Util. Dist. No. 1 of Grays Harbor County v. Idacorp Inc.*, 379 F.3d 641 (9th Cir. 2004) (field preemption, conflict

[2] The court of appeals did not address the conflict preemption argument. Pet. App. at 41a n.23

preemption, and filed rate); *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, 384 F.3d 756 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3343 (U.S. Nov. 5, 2004) (No. 04-621) (field preemption, conflict preemption and filed rate). In two unpublished memorandum opinions addressing related California electricity cases, including another action brought by Petitioner under the same state statute as the instant case, the Ninth Circuit affirmed removal and dismissals of the actions. *California ex rel. Lockyer v. TransCanada Power L.P.*, 2004 U.S. App. LEXIS 21727 (9th Cir. Oct. 12, 2004) (removal jurisdiction, field preemption, conflict preemption, and filed rate); *T&E Pastorino Nursery v. Duke Energy Trading & Mktg., LLC*, 2005 U.S. App. LEXIS 3315 (9th Cir. Feb. 25, 2005) (same).

Petitioner timely filed a petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioner, the California Attorney General, presents two questions for review.

The first is whether the case was "improperly removed . . . because *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), compel the conclusion that neither original nor removal jurisdiction may be found in Section 825p of the Federal Power Act, 16 U.S.C. § 825p. . . ." Pet. at i. This question is not worthy of review. The issue is neither controversial nor important, in part because its answer is obvious. Section 825p on its face is a grant of jurisdiction to the federal courts. It reads in pertinent part:

> The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability

> or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder.

The notion that "neither original nor removal jurisdiction" may be based on that language is specious. As detailed below, *Merrell Dow*, although a removal case, doesn't mention or consider Section 825p or any other special jurisdiction provision, and the decision below in no way conflicts with *Merrell Dow*. *Pan American* is not a removal case and it doesn't mention Section 825p either. Its conclusion that a similarly worded provision in the Natural Gas Act did not create *a jurisdictional defense in state court* to a state law contract claim is not pertinent to the removal of this case. Courts of appeals that have considered whether special jurisdiction provisions like Section 825p may serve as a jurisdictional basis for removal have consistently ruled that they may.

The second question is whether "the sovereign immunity of the States, as preserved by the Eleventh Amendment" bars removal of a civil action filed by the state as a plaintiff, if the action is otherwise within the removal jurisdiction of the federal courts. Petition at *i*. For almost 200 years that question has been answered in the negative by this Court and by every court of appeals that has considered it. The issue does not warrant review.

In addition to holding that the complaints below were properly removed to federal court, the Court of Appeals upheld dismissal of the claims on the merits based on preemption by the FPA and based on the filed rate doctrine. Petitioner does not seek review of or challenge the merits dismissals, which are consistent with a recent series of rulings by the Circuit in similar cases, some brought by Petitioner. In addition, FERC has considered the issues raised by these complaints in separate proceedings in which Petitioner has participated. No public

interest is served by Petitioner's attempt to use state law to circumvent FERC's resolution of the matter.

I. The Decision Below, Upholding Removal under a Federal Statute that Unambiguously Confers Jurisdiction in the District Courts, Is Consistent with the Decisions of this Court and the Other Circuits

A. The Terms of the Relevant Statutes Establish Jurisdiction In This Case.

The question Petitioner articulates for review explicitly raises the issue of whether FPA Section 825p, 16 U.S.C. § 825p, may serve as a basis for original federal jurisdiction. His opening argument to the contrary, however, is based on cases considering the removal of "artfully pled" complaints where original jurisdiction was based solely on the general federal question statute, 28 U.S.C. § 1331, rather than on a special jurisdiction provision. Pet. at 9-10 (relying primarily on *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983) ("*Franchise Tax Bd*")). Where original jurisdiction is based solely on 28 U.S.C. § 1331, the fact that an opinion on removal of such cases fails to mention special jurisdiction provisions does not imply that an "artfully pled" case that falls within such a special jurisdiction provision cannot be removed. Such cases simply do not address the question.

The plain language of the removal statute authorizes removal where a district court has original jurisdiction under a special jurisdiction provision like Section 825p. The removal statute provides for removal of:

> Any civil action of which the district courts have original jurisdiction *founded on a claim or right* arising under the Constitution, treaties or laws of the United States. . . .

28 U.S.C. § 1441(b) (emphasis added). Petitioner concedes that "[t]he ISO tariff has the force of federal law." *See* Pet. at 11 n.4.[3] FPA Section 825p, for its part, provides original jurisdiction:

> The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to *enforce any liability or duty created by*, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder.

16 U.S.C. § 825p (emphasis added). Section 825p plainly grants the district courts certain jurisdiction. All "duties" imposed on Respondents with respect to the sale of Ancillary Services arise from the tariff, which defined the conditions under which energy could and could not be sold. Pet. App. at 6a-7a, 17a. Petitioner's complaint alleged a liability based on a violation of "the rules of the ISO market" which were codified in the tariff. Pet. App. at 133a. Since the underlying duties were the product of a federal tariff, Section 825p provides for original federal jurisdiction over the claim.

That original jurisdiction under Section 825p is also *exclusive*, rather than being concurrent with the courts of the states, cannot reasonably be read to narrow the jurisdictional grant as Petitioner asserts. The fact that the grant of federal jurisdiction makes that jurisdiction exclusive can only strengthen the basis for removal.

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[3] In any event, the "Laws of the United States" include federal regulations, *Fairview Township v. EPA*, 773 F.2d 517, 527 n.19 (3d Cir. 1985), which in turn include federal tariffs. *Marcus v. AT&T Corp.*, 138 F.3d 46, 55 (2nd Cir. 1998)

B. No Conflict Exists with *Merrell Dow*; Removal Here Is Properly Based on a Special Congressional Grant of Jurisdiction Found in the Federal Power Act.

Petitioner claims that the decision below conflicts with *Merrell Dow Pharmaceuticals, Inc. v. Thompson*. *See* 478 U.S. 804, 817 (1986) ("*Merrell Dow*"). This argument is flawed for two reasons. First, as the Court of Appeals explained, *Merrell Dow* considered only jurisdiction predicated solely on 28 U.S.C. § 1331. The *Merrell Dow* Court noted this limit at the outset of its analysis:

> Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action, *Osborn v. Bank of the United States*, 9 Wheat. [22 U.S.] 738, 823, (1824), we have long construed the statutory grant of federal question jurisdiction as conferring a more limited power.

478 U.S. at 807; *see also id.* at 810 ("We have consistently emphasized that, *in exploring the outer reaches of § 1331*, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system") (emphasis added). Even the language from the end of the opinion, 478 U.S. at 817, quoted in the Petition at 15, quotes from and cites 28 U.S.C. § 1331, as Petitioner notes. Where federal jurisdiction is specially conferred under a statute other than 28 U.S.C. § 1331, *Merrell Dow* is not controlling.

As Petitioner notes at 7, the Court of Appeals first identified a special jurisdiction provision as providing a basis for removal, and distinguished *Merrell Dow* on that basis, in *Sparta Surgical Corp. v. National Association of Securities Dealers*, 159 F.3d 1209 (9th Cir. 1998) ("*Sparta*"). *Sparta* provides another example of a case in

which the plaintiff alleged only state law claims, but sought relief "based in part upon [the National Association of Securities Dealer's] purported violation of its own rules[.]" *Id.* at 1211. The rules at issue "were issued pursuant to the [Securities] Exchange Act's directive" regarding "self-regulatory organizations." *Id.* at 1212. Based on the exclusive jurisdiction provision of the Securities Exchange Act, essentially identical to that in the FPA, the court of appeals concluded that the plaintiff sought relief available exclusively in the federal courts. Thus, by seeking remedies only available in federal court, the *complaint* established original jurisdiction in the federal courts. *Id.* at 1212. The appeals court held the plaintiff in *Sparta* could not avoid federal jurisdiction merely by omitting the federal claims necessary to its complaint. *Id.*; *see also Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997).

The analysis below and in *Sparta* has been uniformly adopted by other courts of appeals. There is no split in the circuits on the issue. *See D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93 (2d Cir.), *cert. denied*, 524 U.S. 1066 (2001) (upholding removal and dismissal of state law claims omitting necessary Securities Exchange Act allegation); *Hawkins v. NASD Inc.*, 149 F.3d 330 (5th Cir. 1998) (upholding removal and dismissal of state law claims challenging liabilities and duties created by the Securities Exchange Act); *MM&S Fin., Inc. v. NASD, Inc.*, 364 F.3d 908 (8th Cir. 2004) (dismissing common law state claims as an attempt to plead around the Securities Exchange

Act). Petitioner's attempt to manufacture a split among the circuit courts fails.[4]

Second, the logic of *Merrell Dow* does not extend to this case. *Merrell Dow* considered six state tort causes of action alleging birth defects attributable to the use of the drug Bendectin. Five causes of action were based solely on state law. One negligence *per se* claim alleged an inadequate warning in violation of the Federal Food Drug and Cosmetic Act ("FDCA") as the basis for negligence "per se." 478 U.S. at 805-06. Defendants' removal was based on the one cause of action alleging a violation of the FDCA. *Id.* The Court's analysis assumed that the FDCA did not provide a federal cause of action, and based on that assumption concluded that "Congress did not intend a private federal remedy for violations of the statute that it enacted." *Id.* at 811. The Court reasoned it would therefore undermine "congressional intent to conclude that the federal courts might . . . exercise federal-question jurisdiction and provide remedies for violations of [the FDCA] solely because the violation of the [FDCA] is said

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[4] Thus, Petitioner's assertion that this decision conflicts with other Circuits "which have hewn to *Merrell Dow*" (Pet. at 16 n.8) is incorrect. Because the decision is not inconsistent with *Merrell Dow*, there is no conflict with other Circuits that also properly apply *Merrell Dow*. Nor does *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003) ("*Beneficial*"), affect the analysis. While *Beneficial* recognized "complete preemption" as one basis for federal jurisdiction under the removal statute, *see* 539 U.S. at 8, this Court did not even address, much less overrule, its numerous precedents upholding removal under other doctrines, such as where a state cause of action requires resolution of a substantial question of federal law. *See, e.g., Int'l Coll. of Surgeons*, 522 U.S. at 164; *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202 (1921); *see also Franchise Tax Bd.*, 463 U.S. at 9. Nothing about the decision below, upholding removal of a claimed violation of federal law where the governing federal statute confers exclusive district court jurisdiction, is contrary to this long line of settled case law.

to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law." *Id.* at 812 (footnote omitted).

The Court reiterated this analysis in distinguishing its earlier decision in *Franchise Tax Board*:

> *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. . . . We simply conclude that *the congressional determination that there should be no federal remedy for the violation of this federal statute* is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

Id. at 814 (emphasis added).

Merrell Dow's key conclusion that Congress intended no federal remedy does not fit a statute, such as the one here, that provides an administrative remedy at FERC for claims based on violations of the tariffs, subject to appellate review in Article III courts. *See* 16 U.S.C. §§ 824e(a), 825l(b). As discussed in section A., *supra*, Petitioner has pursued its remedies at FERC for the conduct alleged. Moreover, in contrast to the narrow role played by federal law in *Merrell Dow*, here federal law in the form of the relevant tariff actually created the Ancillary Services that were the subject of the claim.

Petitioner's impassioned argument at 17-18 in substance asks for a ruling from the Court that Congress may

not, for matters of such national importance that it has created a special administrative agency to oversee them, create special original jurisdiction in the federal courts and have that jurisdiction serve as a basis for removal of "artfully pled" claims to federal court. That is not a credible position worthy of review.

C. *Pan American's* Treatment of the Exclusive Jurisdiction Provision of the Natural Gas Act Is Inapposite Here.

Petitioner similarly – and incorrectly – claims the Court of Appeals' decision conflicts with *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961) ("*Pan American*"). *See* Pet. at 13. *Pan American* is inapposite. It is not a removal case. It does not even address federal jurisdiction. Rather, it considers state court jurisdiction to hear a contract claim that did not seek to change, supplement or challenge actions take by the Federal Power Commission [FERC's predecessor] under the Natural Gas Act ("NGA").[5] "The sole question, both below and here, is whether *the state courts* had jurisdiction." *Pan American*, 366 U.S. at 657 (emphasis added). Here the issue is whether the federal court had removal jurisdiction.

Pan American ruled that the exclusive federal jurisdiction provision in the NGA did not preclude state court jurisdiction over contract claims based on contracts the Court had recently held to be subject to FPC jurisdiction under that Act. *Id.* at 660, 662-63. That the Court did not

[5] It is undisputed that, as Petitioner states, the Natural Gas Act and the Federal Power Act share an identical exclusive jurisdiction provision and that they share historically related statutory schemes. *See* Pet. at 14 n.6.

interpret the exclusive jurisdiction provision of the NGA to eliminate state court jurisdiction over claims based on those contracts has no relevance to the removal issue here. Petitioner is not a party to any contract and is not suing to enforce contract rights.

The Ninth Circuit has explicitly recognized, in a related case, that state courts have jurisdiction over *contract* claims that do not impinge on FERC authority, even where the agreement is subject to the agency's jurisdiction. *Pub. Util. Dist. No. 1 of Grays Harbor County v. Idacorp Inc.*, 379 F.3d 641, 652 (9th Cir. 2004). The established notion that a simple contract claim under a tariffed agreement, like a collection action, is filed in state court rather than with FERC has no pertinence here and does not create a controversy suitable for certiorari review.

In *Pan American* the Court first concluded that the complaint's "operative paragraphs demand recovery on alleged contracts. . . . No right is asserted under the Natural Gas Act. The suits are thus based upon claims of right arising under state, not federal, law." *Id.* at 662-63. Having found that the suits were based on state law, the Court had no difficulty in taking the next step of concluding that the NGA's exclusive jurisdiction provision for claims under federal law did not bar bringing the state law contract claim in state court.

The passage that Petitioner quotes as conflicting with the decision below says: "'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." *Id.* at 664. That language merely concludes that because the claim in *Pan American* was not based on the NGA, but rather on state contract law, the claim was not one over

which the federal courts were granted jurisdiction in NGA § 22. Since Section 22 did not grant federal jurisdiction over that claim, the "exclusiveness" provided for in the statute did not bar state court jurisdiction over it. "Exclusiveness" is a consequence of federal jurisdiction, no more.

Here, by contrast, the claims – claims by a non-party to the federal ISO tariff alleging tariff violations – do fall under the terms of the jurisdictional grant in the FPA and therefore federal jurisdiction over them is exclusive.[6] Unlike in *Pan American*, there is no contract at issue separate from the tariff. "The tariff defines the companies' contractual obligation with respect to the conduct at issue. Absent a violation of the FERC-filed tariff, no state law liability could survive." Pet. App. at 17a-18a. By grounding his state law claim in allegations that necessarily turn on the construction of federal law, Petitioner provided the original jurisdiction for the federal courts to hear his complaint. *See Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997); *see also Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1143 (3d Cir. 1977) (distinguishing *Pan American* and finding federal jurisdiction where the plaintiffs' claims, as pled, "alleged injuries flowing from a violation of federal law").[7]

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[6] The *Pan American* analysis does assume that a claim could arise under the NGA and, if it did, that jurisdiction would be based on Section 22 of that Act, contrary to Petitioner's reading of the companion provision in the Federal Power Act.

[7] Petitioner attempts to bolster his *Pan American* argument by stating the "'*Sparta* exception' also conflicts with decisions of other Circuits that adhere to *Pan American*." Pet. at 15 n.7. No such conflict exists. To begin with, as explained above, *Sparta* does not conflict with *Pan American*, thus adherence to *Pan American* does not expose a split in the circuits. Second, the cases Petitioner cites to create this alleged split do nothing of the sort. The first such decision, *Powers v. S. Cent. United Food & Commercial Workers Unions & Employers Health & Welfare Trust*, 719 F.2d 760, 765 (5th Cir. 1983), is irrelevant because that court

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D. Petitioner's State Law Argument About the Scope of California's Unfair Competition Law Counsels Against Granting Certiorari.

Petitioner also argues that the Court of Appeals misinterpreted state law governing his claims under the UCL, and that a different interpretation of state law shows his claim is not predicated on federal law. Pet. at 11-12. That argument provides a separate ground for denial of certiorari. To the extent that the issue presented turns on a question of state law, it is not an issue appropriate for certiorari review. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts").

II. The First Question Presented for Review Is Not Presented By This Case

Certiorari is also inappropriate because the first question on which Petitioner seeks review is not presented by this

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expressly held that the plaintiff's claim "raised no federal issue, and relied on no federal statute," and the federal issue of preemption under the ERISA laws arose solely as a *defense*. Moreover, the issue raised in *Powers* was resolved long ago by this Court, in a manner contrary to that urged by Petitioner, in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 76 (1987), which held that a claim seeking benefits under an ERISA plan "is necessarily federal in character" and thus removeable. *Metropolitan Life* expressly recognized *Powers*' contrary holding and implicitly overruled it. *Metropolitan Life*, 481 U.S. at 62 n.2. *Exxon Corp. v. Hunt*, 683 F.2d 69 (3d Cir. 1982), was not a removal case at all and simply held that no federal jurisdiction lay in a declaratory judgment action seeking a ruling that a state tax was preempted by the federal Superfund Act. That "a declaratory judgment complaint does not state a cause of action arising under federal law when the federal issue is in the nature of a defense to a state law claim," *id.* at 73, has no relevance to Petitioner's claim.

case. *See* S. CT. R. 15(2). The Petitioner's stated question seeks review of a decision in which the Ninth Circuit held that "removal jurisdiction may be found in Section 825p of the Federal Power Act, 16 U.S.C. § 825p, and as the United States Court of Appeals for the Ninth Circuit acknowledged, no other statute authorized the exercise of federal jurisdiction." Pet. at i. That formulation mischaracterizes the Court of Appeals opinion. In his brief, Petitioner asserts that in affirming removal, the Ninth Circuit noted that "*Merrell Dow* precludes federal jurisdiction under 28 U.S.C. § 1331," (Pet. at 6-7), and "stated that these cases would not be removeable under *Merrell Dow*, but held that they were nevertheless removeable under *Sparta*." Pet. at 13 (citing Pet. App. at 18a-19a). A plain reading of the Court of Appeal's decision shows that Petitioner misstates the decision in this regard.

The Court of Appeals did not address whether *Merrell Dow* would bar removal if original jurisdiction were based solely on Section 1331. It did not reach that issue, having found jurisdiction under the express grant of federal jurisdiction in Section 825p. Following *Sparta*, the Ninth Circuit held here that "removal jurisdiction lies over a claim to enforce obligations that squarely fall within the exclusive jurisdiction provision of the Federal Power Act. *See* 16 U.S.C. § 825p." Pet. App. at 22a. Petitioner erroneously attributes as a holding in this case the Ninth Circuit's observation that "*for Sparta's claim*, there would have been no jurisdiction predicated solely on 28 U.S.C. § 1331." Pet. App. at 19a (emphasis added). This case is not *Sparta*. The Court of Appeals expressly declined to reach a decision on the issue in the instant case because it had determined the case was removeable under Section 825p. Pet. App. at 22a & n.11.

As discussed above in section I.B., *Merrell Dow* would not bar removal of this case even if this Court determined that the Ninth Circuit's analysis under *Sparta* were

incorrect. As the Court of Appeals expressly recognized, "[t]he very face of [Petitioner]'s complaint betrays that the gravamen of the complaint is the companies' alleged violations of federal tariff obligations." Pet. App. at 17a n.6. Petitioner's "state claim represented a naked attempt to enforce these federal obligations." Pet. App. at 22a. Thus, a federal question is apparent on the face of the complaint, and Petitioner does not challenge the dismissal on the merits. "'[E]ven though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.'" *Int'l Coll. of Surgeons*, 522 U.S. at 164 (*quoting Franchise Tax Bd.*, 463 U.S. at 13). This Court "reviews judgments, not statements in opinions," *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not ordinarily "decide questions that cannot affect the rights of litigants in the case before" it. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Petitioner presents a question that is not raised in this case, and resolution of the issues on which Petitioner seeks review will not affect the outcome.

III. Sovereign Immunity Does Not Bar Removal Where There Is No Claim Against the State

Petitioner also seeks review of whether state sovereign immunity "as preserved by the Eleventh Amendment" barred removal of the case. Pet. at i; 21-27. That is not a question worthy of review. The issue is settled by a consistent line of authority from this Court and the courts of appeals.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United*

> *States* by Citizens of another State, or by Citizens or Subjects of any Foreign State. (emphasis added)

This is not a case "commenced or prosecuted against" a state. It is a case brought initially by a state in which no claim of any kind was asserted against the state. Sovereign immunity does not apply to the simple removal of such a case to federal court.

The Court of Appeals of course recognized in its opinion below that under this Court's rulings a state's sovereign immunity is broader than the strict language of the Eleventh Amendment, which preserves the "States' immunity from suit" as it existed at the time the Constitution was adopted. Pet. App. at 23a-24a, citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669 (1999) (sovereign immunity transcends the narrow text of the Amendment itself); *Alden v. Maine*, 527 U.S. 706 (1999) (immunity for suits in state court); *Hans v. Louisiana*, 134 U.S. 1 (1890) (immunity for suits by citizen of state itself). All of these cases, however, and the preserved immunity they recognize, involved lawsuits *against* a state seeking monetary or injunctive relief. Where the suit, as here, is *by* the state, this Court and the courts of appeals have adhered to the language of the Eleventh Amendment and held for nearly 200 years that no immunity is available. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F. 3d. 1559, 1564 (Fed. Cir. 1997). As the Court of Appeals demonstrated, in a scholarly analysis which Petitioner simply ignores, (*see* Pet. App. at 23a-34a), there is unusually compelling authority that suits by a state were not within the scope of sovereign immunity at the time the Eleventh Amendment was adopted.

Petitioner nonetheless contends that the involuntary removal of its lawsuit to federal court violates the Eleventh Amendment by forcing it to litigate in federal court. Pet. at

21. This contention has been consistently rejected. It ignores the fact that the key purpose of sovereign immunity is to bar private suits against the state that would subject it to judgments that could drain the public treasury, restrain the government from acting or compel it to act. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (*quoting Dugan v. Rank*, 372 U.S. 609, 620 (1963)). That obviously is not the case here where Respondents seek no relief – monetary, injunctive or otherwise – against the state. Removal of such a case to federal court neither raises sovereign immunity concerns nor converts the case to one "commenced or prosecuted against" a state within the meaning of the Eleventh Amendment.

A. There Is No Question of First Impression, and this Court Has Consistently Held that Removal Does Not Constitute the Commencement or Prosecution of a Lawsuit Against the State.

In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the state of Virginia raised the Eleventh Amendment as a bar to review by the Supreme Court of a state court prosecution of individuals who had been convicted of selling lottery tickets in violation of Virginia law. The defendants sought review on the ground that the Supremacy Clause barred prosecution because the lottery had been authorized by Congress.[8]

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[8] Procedurally, *Cohens v. Virginia* involved a writ of error seeking review by the Supreme Court of a judgment of a Virginia state court, rather than removal of an action to federal district court. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 375-76. Nevertheless *Cohens* sets forth this Court's understanding of whether, at the time the Eleventh Amendment

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Chief Justice Marshall noted that, at the time the Constitution was adopted, all the states were greatly indebted and there was great apprehension that these debts might be prosecuted in the federal courts. *Id.* at 406; *see also Alden v. Maine*, 527 U.S. 706, 749-50 (1999). It was widely believed that principles of sovereign immunity would bar such suits.[9] Shortly after the Constitution was adopted, however, the Supreme Court held that a state could be sued by individual citizens of another state to collect such debts. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).[10] This resulted in the prompt passage of the Eleventh Amendment.

The primary purpose of the Eleventh Amendment was to bar such private suits by creditors of the state, and, according to Justice Marshall in *Cohens v. Virginia*, it therefore "extended to suits commenced or prosecuted by individuals, but *not* those brought *by* states." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 407 (emphasis added). Justice Marshall then went on to discuss whether a case filed by the state and subsequently brought into federal court by the defendant was one "commenced or prosecuted" against the state. Pointing out that "[t]o commence a suit, is to demand

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was adopted, sovereign immunity attached to actions prosecuted by a state.

[9] *See, e.g.*, Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). Hamilton states in Federalist 81 that suits by individuals against states to collect the debts they owe were not possible due to sovereign immunity which "is the general sense and the general practice of mankind."

[10] The facts of *Chisholm* explain why the Eleventh Amendment was drafted to apply only to suits by citizens of "other states." Later decisions, including *Hans v. Louisiana*, 134 U.S. 1 (1890), and *Alden v. Maine*, 572 U.S. 706 (1999), applied the same reasoning to individual lawsuits to collect debts filed by a state's own citizens and in its own courts. This reasoning has no application here, where respondents are not seeking to collect a debt owed by the state.

something by the institution of process in a Court," Justice Marshall answered this question in the negative:

> "It is then, the opinion of the Court, that the defendant who removes a judgment rendered against him by a state court into this Court . . . *does not commence or prosecute a suit against the state.*"

Id. at 412 (emphasis added).

Two later Supreme Court decisions confirm that removal does not constitute commencement or prosecution of a lawsuit against the state within the meaning of the Eleventh Amendment. *Illinois v. City of Milwaukee*, 406 U.S. 91, 101 (1972) ("where a State is suing parties who are not other States . . . those suits 'may now be brought in or removed to the Circuit Courts [now the District Courts] [*sic*] without regard to the character of the parties'") (footnote omitted) (citing *Ames v. State of Kansas*, 111 U.S. 449 (1884)). *Ames* involved 28 U.S.C. § 1441 passed in 1875 to permit removal to lower federal courts based on federal question jurisdiction. The defendants removed an action filed by the state in its own courts based on this federal question jurisdiction.[11] The issue was whether the removal statute applied to states given their sovereign immunity. 111 U.S. at 470. This court noted that the state in *Cohens v. Virginia*, *supra*, had claimed the "same exemption" and Justice Marshall found that it would have great force where the case involves a demand by a citizen against his state, but not so for "a prosecution instituted against him by a State." *Id.* It then held the case was removable.

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[11] *Ames*, like this case, was an action by the state Attorney General against private parties. The Attorney General alleged that a consolidation among railroads was wrongful and unlawful.

Petitioner relies heavily on *Hans v. Louisiana*, 134 U.S. 1 (1890), as modifying or reversing the *Cohens-Ames* line of cases, and creating a presumption of immunity. This presumption, however, applies only to suits *against* the state.[12] *Hans* involved a claim *against* the state by one of its own citizens to recover money damages. Since the Eleventh Amendment only covers suits by citizens of another state, the issue was whether it also applies to suits by citizens of the same state. Reiterating the point that sovereign immunity is based on the need of states to have the "privilege of paying their own debts in their own way," 134 U.S. at 13, the *Hans* Court concluded that the rationale for sovereign immunity applied equally to suits by a state's own citizens as to suits by citizens of other states. At no time did the *Hans* court suggest that immunity should apply when there was no claim against the state, or to lawsuits that the state itself commences.[13]

B. The Circuits Are Not Divided.

Petitioner asserts that there is a split in the circuits due to the Eighth Circuit decision in *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (1995). *Thomas*, however, was

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[12] The presumption referenced in *Hans* is that, at the time the Constitution was adopted, sovereign immunity for claims against the state was well-settled, and there was thus a presumption that "no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution[.]" 134 U.S. at 18. The "anomalous proceedings" were suits against the state to collect debts. Respondents have no quarrel with this point, but it has no application here where respondents assert no claims against the state.

[13] In fact, the *Hans* court distinguished *Cohens v. Virginia*, *supra*, citing *Cohen's* language that there is no immunity where "[n]othing is demanded from the state. No claim against it of any description is asserted or prosecuted." 134 U.S. at 19.

not an action filed by the state as plaintiff and did not involve removal at all. There is no split among the Circuits on the issue Petitioner has presented.

Thomas was an environmental lawsuit by a citizens group in which the defendant moved to join a state agency as a party under Federal Rule of Civil Procedure 19(a). The Eighth Circuit held that such coercive joinder would undermine two aims of the Eleventh Amendment: protection of a state's autonomy and protection for its pocketbook. *Thomas*, 50 F.3d at 506. It would undermine autonomy by permitting a defendant to unilaterally waive the state's immunity, and undermine the state treasury since premature litigation would potentially limit the costs the state agency could recover in later litigation. *Id.*

Unlike a coercive joinder, however, the removal of a lawsuit filed by the state is neither a unilateral waiver of the state's immunity by a defendant nor does it pose a threat to the state treasury. Mere removal does not trigger any litigation against the state or force it to litigate any claims it has not already decided to litigate. Removal does not, as does coercive joinder, either "restrain the Government from acting or compel it to act." Pet. at 22. There is no conflict between the Ninth Circuit decision here and *Thomas*.

Other circuits and district courts have likewise concluded that removal of a lawsuit by the state does not implicate the policies underlying the Eleventh Amendment.[14]

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[14] There are two district court cases holding that the Eleventh Amendment precludes removal – *People v. Steelcase*, 792 F.Supp. 84, 86 (C.D.Cal. 1992); *Moore ex rel. Mississippi v. Abbott Labs., Inc.*, 900 F. Supp. 26, 30-31 (S.D.Miss. 1995) – but *Steelcase* cited no authority for so holding and then *Moore* simply relied on *Steelcase*. Both decisions have been criticized as lacking analysis or authority. *Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F. Supp. 2d 1036, 1040 (D. Minn. 1999). Moreover, *Steelcase* was effectively overruled by the decision below. Pet. at 33a, n.15.

Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co., 359 F.3d 1237, 1239 (10th Cir. 2004) (finding that removal of an action filed by the state was not barred by the Eleventh Amendment and concluding that nearly every court to consider the issue in the removal context has concluded that "a State cannot assert Eleventh Amendment immunity to bar removal of a suit it has brought");[15] *Vermont v. Oncor Comms., Inc.*, 166 F.R.D. 313, 321 (D. Vt. 1996) ("The Eleventh Amendment does not bar removal of an action involving a federal question in which a state is a plaintiff); *Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F. Supp. 2d 1036, 1039-40 (D. Minn. 1999) (holding removal not barred when state is plaintiff relying on *Illinois v. City of Milwaukee*, *supra*, and numerous other cases); *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 297 (S.D.N.Y. 2001) ("[W]hile the Eleventh Amendment in some areas has been extended beyond its textual limits, this is not the case with respect to state plaintiffs"); *S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 778 F. Supp. 1515, 1522 (D.S.D. 1991). It was this body of case law that led the District Court here to find the petitioner's appeal of the immunity issue to be frivolous.[16] Pet. App. at 102a-103a. There is no split in the Circuits, or among the courts, on this issue.

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[15] *Oklahoma* did note that, when counterclaims are asserted against the state, the Eleventh Amendment may apply. 359 F.3d at 1240. Respondents here, however, have neither filed counterclaims nor sought any relief at all from the state.

[16] Other cases outside the removal context also hold there is no sovereign immunity when the state is a plaintiff. *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (Fed. Cir. 1997) ("the Eleventh Amendment applies to suits 'against' a state, not suits by a state"), *cert. denied*, 523 U.S. 1089 (1998); *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 24 n.6 (5th Cir. 1980) ("Of course, the eleventh amendment is inapplicable where a state is a plaintiff . . .").

C. The Court of Appeals Decision Does Not Expand Removal Jurisdiction or Threaten State Sovereignty.

Petitioner also argues that the Court of Appeals decision expands federal jurisdiction in a manner that creates uncertainty and is inconsistent with principles of federalism. Pet. at 25-27. Petitioner is mistaken. Federalism does not require immunity where no claim is asserted against the state. *Illinois v. City of Milwaukee*, 406 U.S. at 91, 101 (1972); *Cohens v. Virginia*, *supra*.

Petitioner cites *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J. and Stewart, J. concurring), and *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944) ("*Great Northern*"), for the proposition that the state should be able to choose its forum. Neither case, however, was an action by a state at all, let alone suggests that a state must always be able to choose its own forum. *Employees of the Department of Public Health* was an action by state employees against the state for overtime compensation. 411 U.S. at 280-81. This Court held that amendments to the Fair Labor Standards Act extending coverage to certain state employees did not waive the immunity of states from suit in federal court. *Id.* at 286-87. *Great Northern* was an action against the Oklahoma Insurance Commissioner to recover taxes paid under protest under an Oklahoma statute. 322 U.S. at 48. The court concluded that the state law could not operate as a waiver of immunity in federal courts. *Id.* at 54. Both cases involved claims against the state, and simply held that Eleventh Amendment immunity was not waived by the legislative enactments at issue. Neither has any relevance here.

Petitioner belatedly complains that its state law claims were "unexpectedly" alchemized into a federal case. This was, however, a self-inflicted wound. Petitioner alleged in the first paragraph of its Complaint that this was a scheme to violate a federal tariff. Pet. App. at 133a. The basis for virtually every charging allegation was a violation of various parts of that federal tariff. *Id.* at 148a-157a.

In short, there is no novel question here, and no uncertainty. When the state itself commences a lawsuit, and no claim or relief is sought against the state, the removal of such a lawsuit to federal court does not implicate the principles of sovereign immunity. This simple rule has been followed by this Court and other courts for nearly 200 years, and was applied by the Ninth Circuit here. There is no issue of first impression and no split in the circuits.

CONCLUSION

The Ninth Circuit Court of Appeals faithfully applied this Court's established precedent in upholding original jurisdiction over Petitioner's claim. In so doing, the Court of Appeals joined in the reasoning of the other federal circuit courts that have addressed this issue. Lacking any novel area of the law and with no split among the federal circuit courts, there are no compelling reasons for this Court to grant a petition for a writ of certiorari in this matter. Lacking such compelling reasons, this Court should deny the petition.

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In The
Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
BILL LOCKYER, ATTORNEY GENERAL,

Petitioner,

v.

DYNEGY, INC. et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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TABLE OF CONTENTS

Page

I. THERE IS NO PRINCIPLED WAY TO RECONCILE THE NINTH CIRCUIT OPINION WITH EITHER *MERRELL DOW* OR *PAN AMERICAN* 1

A. *Merrell Dow* Controls Removal, Whatever the Source of Original Jurisdiction 2

B. *Pan American* Forecloses the Bid for Original Jurisdiction Under Section 825p... 5

II. THIS COURT SHOULD DECIDE WHETHER SOVEREIGN IMMUNITY ALLOWS THE STATES TO RESIST REMOVAL OF STATE LAW ENFORCEMENT ACTIONS..... 7

CONCLUSION..... 10

TABLE OF AUTHORITIES

Page

CASES

Ames v. Kansas, 111 U.S. 449 (1884) 8

AmSouth Bank v. Dale, 386 F.3d 763 (6th Cir. 2004) 4

Beneficial National Bank v. Anderson, 539 U.S. 1 (2003) 4

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 6

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 8

Fed. Maritime Comm'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002) 8

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) 5

Gully v. First National Bank, 299 U.S. 109 (1936) 5

Hans v. Louisiana, 134 U.S. 1 (1890) 8, 9

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 8, 9

Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) 5

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) 1, 2, 3, 7

Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang, 376 F.3d 831 (9th Cir. 2004) 4

Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961) 1, 5, 7

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 9

Roddy v. Grand Trunk Western R.R. Inc., 395 F.3d 318 (6th Cir. 2005) 4

TABLE OF AUTHORITIES – Continued

Page

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 5

Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002) 3

Thomas v. FAG Bearings, 50 F.3d 502 (8th Cir. 1995) 9

STATUTES

16 U.S.C.
§ 825p 1, 2

28 U.S.C.
§ 1331 2
§ 1441 ..... 2, 3

42 U.S.C.
§ 2014(hh) 4
§ 9601 *et seq.* 2
§ 9613(b) 2

California Business & Professions Code
§ 17200 2

The Generators oppose this petition as unworthy of review, but they fail to reconcile either *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), or *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), with the Ninth Circuit's analysis. The Generators cannot cite a single case from this Court or any other Court of Appeals to support the conclusion that a state law enforcement action can be removed to federal court under section 825p of the Federal Power Act (the "FPA"), 16 U.S.C. § 825p ("section 825p"). Further, the Generators do not begin to address the practical implications of this analysis for state law enforcement. Thus, the reasons that this Court should grant the writ remain unchallenged: the Ninth Circuit's jurisdictional analysis conflicts with decisions of this Court and the other courts of appeals, skews the balance between state and federal judicial authority in significant and highly unpredictable ways, puts state law enforcement on a collision course with the federal courts and violates the states' sovereign immunity.

I. THERE IS NO PRINCIPLED WAY TO RECONCILE THE NINTH CIRCUIT OPINION WITH EITHER *MERRELL DOW* OR *PAN AMERICAN*.

The Generators give *Merrell Dow, Pan American,* and the opinion below a tortured reading in a bid to disguise conflicts that the Court of Appeals candidly recognized.

A. *Merrell Dow* Controls Removal, Whatever the Source of Original Jurisdiction.

The Generators argue that *Merrell Dow* does not control because 28 U.S.C. § 1331, rather than section 825p, was the source of original jurisdiction for the state law claim removed in that case. The Generators argue that section 825p provides a "special" grant of original jurisdiction, rendering *Merrell Dow* irrelevant. Joint Op. at 9, 11. *Merrell Dow* cannot be limited in this fashion. As a threshold matter, the Court of Appeals opinion acknowledges that under *Pan American*, section 825p is *not* a source of original jurisdiction.[1] Pet. App. at 21a, fn. 10. Further, the propriety of removal under 28 U.S.C. § 1441 was precisely the issue before the Court in *Merrell Dow*. 478 U.S. at 808. Whatever source of "original" jurisdiction the Generators try to invoke, the requirements of the removal statute must be met, as set forth in *Merrell Dow*.

The Generators' contention that federal law (in the form of a tariff violation) is "essential" to the Business & Professions Code section 17200 ("section 17200") cause of action here in issue is not based upon the pleading requirements of California law, which provides the relevant standard under the well-pleaded complaint rule. *See* Pet. at 10. This argument is based on a myth that all legal rights and obligations with respect to the transactions at issue in these cases stem exclusively from the ISO tariff

[1] In addition, section 825p does not resemble statutes in which Congress has clearly made a special grant of jurisdiction that is both original and exclusive. *See, e.g.*, 42 U.S.C. § 9613(b) (part of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.).

See, e.g., Joint Op. at 10, 14, 17. But the ISO tariff no more created the sale of reserve generation capacity (or "ancillary services," as it is called in the tariff) than it created the sale of electric power. These sales long predated both deregulation and the ISO tariff.[2] Similarly, law enforcement of state fraud and unfair competition laws arising from double selling of reserve generation capacity is neither intrinsic to nor dependent upon the tariff. In any event, the myth that the tariff is "essential" does not help the Generators reconcile the opinion with *Merrell Dow*, which bars removal because the FPA provides no federal right of action.

The attempt to distinguish these cases from *Merrell Dow* on the grounds that the FPA provides an administrative remedy also fails. *See* Joint Op. at 14. The right of removal is purely a creature of statute and is to be strictly construed. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002). The mere existence of an administrative remedy does not indicate that Congress intended to provide a federal cause of action that could form the basis for the exercise of removal jurisdiction under 28 U.S.C. § 1441 and *Merrell Dow*. Even farther afield is the notion that the ISO tariff – which expresses the intention only of the market participants and the Federal Energy Regulatory Commission ("FERC") – could form the basis for the exercise of federal removal jurisdiction. A tariff, though it

[2] Before deregulation, California's utilities provided reserve generation capacity to themselves and purchased the balance of their requirements through bilateral contracts with other utilities. The ISO now buys that capacity for the utilities through a centralized auction process. But reserve capacity is still reserve capacity and a promise to hold capacity in reserve without any intention of holding capacity in reserve is still fraudulent under state law.

has the force of federal law, cannot expand federal subject matter jurisdiction, either directly or by implication. *See, e.g., Roddy v. Grand Trunk Western R.R. Inc.*, 395 F.3d 318, 326 (6th Cir. 2005); *AmSouth Bank v. Dale*, 386 F.3d 763, 776-777 (6th Cir. 2004) (and cases cited therein); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 836 (9th Cir. 2004).

The Generators fundamentally misstate the issue. The California Attorney General does not contend that Congress lacks the *power* to authorize removal of purely state law claims. As this Court pointed out in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), Congress has the power to authorize removal of state law claims when it completely preempts state law by: 1) providing an exclusive federal cause of action for the claim asserted; and 2) setting forth procedures and remedies governing that cause of action. 539 U.S. at 8. There is no contention, however, that the FPA completely preempts state law enforcement. In addition, Congress has the power to authorize removal of purely state law claims even when it does not provide a federal cause of action. *See id.* at 6 (citing the "unusual pre-emption provision" in the Price-Anderson Act, 42 U.S.C. § 2014(hh), "that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state law claims.") Unlike the Price-Anderson Act, however, section 825p of the FPA does not expressly authorize removal of purely state law claims. Plainly, Congress knows how to authorize removal of state law claims, but it did not do so in section 825p.

B. *Pan American* Forecloses the Bid for Original Jurisdiction Under Section 825p.

The Generators argue that *Pan American* does not conflict with the opinion below because it is not a removal case. Joint Op. at 15. The weakness of this argument is apparent. In *Pan American,* the defendants challenged the jurisdiction of a state court over state law claims on the basis of an exclusive jurisdiction clause in the Natural Gas Act. The Court held that clause, virtually identical to section 825p, is not a source of original jurisdiction. *Pan American,* 366 U.S. at 664. The procedural distinction makes no difference because the legal issue decided is the same.[3]

The Generators' argument ultimately concedes the point made in the petition: federal jurisdiction under section 825p, if it exists, stands outside this Court's paradigm for removal of state law claims. Their argument boils down to this: a state law enforcement action that can be characterized as relating to a FERC tariff is removable under section 825p even though pleading the state law claim does not necessarily depend on a tariff violation, even though Congress has provided no federal cause of action, and even though section 825p does not explicitly authorize removal of state law claims. This expands

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[3] Further evidence that this procedural distinction is irrelevant is found in the *Pan American* Court's reliance on removal analysis to decide the case. *See* 366 U.S. at 662-665 (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)). This Court has also referred to *Pan American* as a removal case. *See Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 10 n.9 (1983).

removal jurisdiction for purely state law claims beyond the parameters this Court has tolerated even in the context of complete preemption. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 394-399 (1987). There is no doubt that the Ninth Circuit's opinion significantly expands removal jurisdiction and demands this Court's review.

The Generators grossly overreach when they suggest that by not addressing the merits of the case as a whole in this petition, the Attorney General has conceded the futility of the underlying actions.[4] Joint Op. at 1, 8-9. Omitting an issue in a petition for certiorari is not an admission of futility. This petition argues that under our federal system of government, the merits of the Generators' defenses were for the state court to decide. If the Court grants this petition and reverses for lack of subject matter jurisdiction, the Ninth Circuit's decision on the merits of the underlying actions will be void in any event, and the Generators will have a full opportunity to argue

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[4] The Generators' discussion of the so-called "regulatory background" of this petition is a poorly disguised attempt to persuade the Court of their defense on the merits of the underlying actions. See Joint Op. at 1-4. Moreover, this discussion is riddled with misrepresentations. The claim that FERC settled double selling claims against Reliant and Dynegy with "significant participation by Petitioner" is highly misleading. *See id.* at 3. Reliant and Dynegy entered into proposed settlement agreements with FERC trial staff with virtually no input from the California Attorney General. FERC then approved those agreements, after refusing to hold a hearing that would have allowed the California Attorney General to meaningfully challenge any aspect of those agreements. The Generators' claim that the settlement payments made by Reliant and Dynegy "derived" from analyses supplied by the California Attorney General is also highly misleading. *See id.* at 3-4. In fact, the California Attorney General argued that the settlement amounts FERC approved represented only a small fraction of Reliant's and Dynegy's illegal gains.

their defenses in state court. If the Court does not grant the petition, the published opinion of the Ninth Circuit will stand in conflict with *Merrell Dow* and *Pan American*, inviting new decisions that will further erode this Court's jurisprudence limiting removal of state law claims, and will put the sovereign immunity of the states squarely in play. There is more than enough here at stake to warrant this Court's review.

II. THIS COURT SHOULD DECIDE WHETHER SOVEREIGN IMMUNITY ALLOWS THE STATES TO RESIST REMOVAL OF STATE LAW ENFORCEMENT ACTIONS.

None of the cases the Generators rely upon supports the categorical conclusion that where a state is a plaintiff, this Court has "adhered to the language of the Eleventh Amendment and held for nearly 200 years that no immunity is available." Joint Op. at 21. The fact that many sovereign immunity cases decided to date involve lawsuits against a state merely reflects the reality that often these are the cases involving the highest stakes, and the ones to which states choose to dedicate resources. It is a mistake to infer from this, as do the Generators, a bright-line rule against sovereign immunity in all cases where states are plaintiffs. As this Court has held, shielding state treasuries is but one function of sovereign immunity: "the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns. It is for this reason, for instance, that sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages

or some other type of relief."[5] *Fed. Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 765 (2002) (citations and internal quotation marks omitted).

The specific issue presented here – whether sovereign immunity bars involuntary removal of state law enforcement proceedings – has not been "settled by a consistent line of authority from this Court and the courts of appeals," as the Generators claim. Joint Op. at 20. The Generators misread the three cases on which they rely: *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Ames v. Kansas*, 111 U.S. 449 (1884); and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Cohens did not address removal at all: it held only that the Supreme Court had appellate jurisdiction to review the final judgment of the highest court of a state in a suit between a state and one of its own citizens, because such appellate review is not a "suit" within the meaning of the Eleventh Amendment. *Cohens,* 19 U.S. (6 Wheat.) at 412. Similarly, state sovereign immunity was not at issue in *Ames*. This explains why the Court did not cite *Ames* in *Hans v. Louisiana*, 134 U.S. 1 (1890), a sovereign immunity case the Court decided only six years later. There is no indication in *Ames* that the State of Kansas either challenged removal as a general matter or raised sovereign immunity as a bar to removal. Rather, Kansas contended the case should have been removed to the Supreme Court, under its Article III original jurisdiction, rather than to the inferior circuit court. *See* 111 U.S. at 469-472;

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[5] As *amici* point out, forcing the state into federal court via removal leaves it subject to the issuance of orders against it that could affect the state treasury. *See* Amicus Brief at 17.

Illinois v. City of Milwaukee, 406 U.S. at 100-101.[6] Finally, *Illinois* was not a removal case, and involved no sovereign immunity issues. The Court merely adhered to *Ames*'s holding that suits brought by a state against another state need not be brought in the Supreme Court. *Illinois*, 406 U.S. at 101.

Further, the Generators' effort to reconcile the conflicting decisions of the Courts of Appeals fails. The reasoning of *Thomas v. FAG Bearings*, 50 F.3d 502 (8th Cir. 1995), cannot be reconciled with the decision below, or with the other lower court cases that categorically refuse to consider sovereign immunity in cases where the state is a plaintiff.

Finally, the Generators' claim that the decision below does not pose a threat to state sovereign interests simply restates their jurisdiction argument and is belied by the arguments advanced by the 19 *amici* states. But as one Justice of this Court recognized, "[w]hether the assertion of an Eleventh Amendment claim is well founded . . . is a question separate from the question whether the Eleventh Amendment interests are 'too important to be denied review. . . .'" *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 148 (1993) (Blackmun, J. concurring; citation omitted). If the Ninth Circuit's jurisdictional analysis under section 825p is correct, only sovereign immunity can preserve the states' authority to enforce their own laws in their own courts.

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[6] Although the holdings in *Cohens* and *Ames* are still good law, the dictum in these cases on which the Generators' argument depends retains no constitutional significance after *Hans*. *See Hans*, 134 U.S. at 19-21 (limiting *Cohens*).

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 25, 2005

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PEOPLE OF THE STATE OF CALIFORNIA,
ex rel. BILL LOCKYER, ATTORNEY GENERAL,
Petitioner,

v.

DYNEGY INC., *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, HAWAII, IDAHO, IOWA, MAINE, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, OHIO, OKLAHOMA, OREGON, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the California Attorney General's state law enforcement proceedings were improperly removed from state court and adjudicated in federal district court, because *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), compel the conclusion that neither original nor removal jurisdiction may be found in section 825p of the Federal Power Act, 16 U.S.C. Section § 825p, and as the United States Court of Appeals for the Ninth Circuit acknowledged, no other statute authorized the exercise of federal jurisdiction.

2. Even if the district court had jurisdiction, whether the sovereign immunity of the States, as preserved by the Eleventh Amendment to the Constitution, nevertheless barred involuntary removal of these state law enforcement proceedings.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE WRIT 2

I. The Ninth Circuit's Re-Characterization of California's State-Law Claims Conflicts With This Court's Precedent and, More Generally, With the Constitutional Division of Power Between the States and the Federal Government. 2

A. The Ninth Circuit's Decision Irreconcilably Conflicts With *Merrell Dow* and *Pan American*. 3

B. The State Courts Are Competent To Resolve Issues of Federal Law. 6

C. Principles of Federalism Dictate That State and Federal Courts Operate in Separate and Distinct Jurisdictional Spheres. 7

D. The Well-Pleaded Complaint Rule Strikes a Logical Balance Between State and Federal Jurisdiction. 11

II. Whether the Removal Statute Effects an Unconstitutional Abrogation of State Sovereign Immunity Is a Question of First Impression and National Importance. 12

A. The Court Looks Beyond Litigation Formalities To Determine Whether State Sovereignty Prohibits a Suit. 14

B. Subjecting States to Federal Jurisdiction Without Their Consent Raises Serious Constitutional Questions and Requires, At the Very Least, a Clear Statement From Congress. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Ableman v. Booth, 62 U.S. 506 (1858) 8

Alden v. Maine, 527 U.S. 706 (1999) 8, 14, 16

Amalgamated Clothing Workers of America v. Richman Bros. Co., 348 U.S. 511 (1955) 6

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 9, 14, 18, 20

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970) 10

Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775 (1991) 15, 19

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 13

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 6

College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999) 13, 14, 18

Edelman v. Jordan, 415 U.S. 651 (1974) 15, 17

Ex parte New York, 256 U.S. 490 (1921) 15

Federal Maritime Comm'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002) 14, 15, 18

Franchise Tax Bd. of the State of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983) 10, 11, 12

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 18

Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285 (1922) 6

Gregory v. Ashcroft, 501 U.S. 452 (1991) 8, 19

Gully v. First National Bank, 299 U.S. 109 (1936) 11, 12

Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273 (1906) 13, 17

Hans v. Louisiana, 134 U.S. 1 (1890) 13, 15

Hillsborough County, Fla., v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 9

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 15

In re Ayers, 123 U.S. 443 (1887) 17

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 13

Lapides v. Bd. of Regents of the Univ. Sys. of Georgia, 535 U.S. 613 (2002) 18

Louisiana v. Jumel, 107 U.S. 711 (1982) 15

Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) 12

Maryland v. Louisiana, 451 U.S. 725 (1981) 9

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) ..... passim

Missouri v. Fiske, 290 U.S. 18 (1933) 16, 17

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 16

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) 13

Owasso Independent School Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) 9

Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961) ..... passim

Parden v. Terminal R. of Ala. Docks Dept., 377 U.S. 184 (1964) 18

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 16

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 6

Pratt v. Paris Gaslight & Coke Co., 168 U.S. 255 (1897) 5, 6

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 17

Raygor v. Regents of Univ. of Minnesota, 534 U.S. 533 (2002) 9, 19

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 13, 15

Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc., 159 F.3d 1209 (9th Cir. 1998) 4, 6

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 8

Taylor v. Anderson, 234 U.S. 74 (1914) 11

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 9, 13, 19

Statutes

15 U.S.C. § 717r 5

28 U.S.C. § 1331 ..... passim

28 U.S.C. § 1441 6

28 U.S.C. § 1441(a) 10

28 U.S.C. § 1447(a) 17

28 U.S.C. § 1447(c) 10

Federal Power Act, 16 U.S.C. § 825p ..... i, 4, 5, 8

The Anti-Injunction Act, 28 U.S.C. § 2283 9

Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. 2

Other Authorities

The Federalist No. 51, pp. 350-51 (J. Cooke ed. 1961) 7

U.S. Const. amend. XI. ..... passim

Rules

Fed. R. Civ. P. 11 17

Fed. R. Civ. P. 37 17

Sup. Ct. R. 10(c) 3

Sup. Ct. R. 37.4 1

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The States of Alabama, Alaska, Delaware, Hawaii, Idaho, Iowa, Maine, Minnesota, Missouri, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Tennessee, Utah, Washington, and West Virginia and the Commonwealth of Virginia (collectively "the *amici* States") respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4. The *amici* States submit this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed in this case by the People of the State of California.

INTEREST OF *AMICI CURIAE*

This case presents fundamental issues of jurisdiction and state sovereignty. The *amici* States have a sovereign interest in protecting the physical, environmental, and economic well-being of their citizens, and vindicate that interest by enacting laws and bringing civil actions to enforce those laws in state courts. The *amici* States' interest in protecting their citizens is no less compelling simply because, as here, state-law enforcement proceeding might implicate federal law. Neither do principles of state sovereignty-law hinge on whether a State, compelled to litigate state-law claims in federal court, is formally a plaintiff or defendant. In either instance, the interference with sovereign authority is profound. In each instance, the sovereignty of the States is stripped away and the authority of the States to protect their citizens frustrated.

REASONS FOR GRANTING THE WRIT

During the California energy crisis of 2000-2001, the Respondents allegedly engaged in fraudulent business practices that threatened California residents. Among other things, Respondents are said to have accepted payment for energy reserves that they did not, in fact, hold in reserve, thereby jeopardizing the safety and security of California residents. The California Attorney General brought civil enforcement proceedings in state court alleging the Respondents' fraudulent sale of both electric power and the capacity to generate electric power in violation of state law, namely, California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.

Importantly here, California took great care in pleading its complaint to state causes of action only under state law. Even so, Respondents removed the case to federal district court. The State moved to remand, contending that the federal court lacked jurisdiction over the state-law claims; its motion, however, was denied. On appeal, the Ninth Circuit (i) recharacterized the State's well-pleaded, state-law claims as phantom federal claims, and then (ii) rejected the State's submission that its sovereign immunity barred removal of the state-law claims to federal court over its objection. The Ninth Circuit erred on both counts.

I. The Ninth Circuit's Re-Characterization of California's State-Law Claims Conflicts With This Court's Precedent and, More Generally, With the Constitutional Division of Power Between the States and the Federal Government.

The decision of the Ninth Circuit is in astonishingly stark – and even acknowledged – conflict with the decisions of this Court in *Merrell Dow Pharmaceuticals*

Inc. v. Thompson, 478 U.S. 804 (1986), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). Furthermore, because *Merrell Dow* and *Pan American* are deeply rooted in principles of federalism that dictate firm boundaries between federal and state jurisdiction and preserve the sovereign authority of the states to police unlawful conduct within their borders, the Ninth Circuit's decision threatens to upset the delicate balance between state and federal power.

A. The Ninth Circuit's Decision Irreconcilably Conflicts With *Merrell Dow* and *Pan American*.

The Ninth Circuit's decision is directly in the teeth of this Court's decisions in *Merrell Dow* and *Pan American*; that fact alone warrants this Court's intervention. *See* Sup. Ct. R. 10(c).

The rule of law established by this Court in *Merrell Dow* is clear:

> [A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Merrell Dow, 478 U.S. at 817 (quoting 28 U.S.C. § 1331). Thus, federal question jurisdiction exists (even over a state-law cause of action) when Congress creates a federal cause of action covering the conduct at issue; conversely, federal question jurisdiction does *not* exist where Congress has not done so.

In this case, the Ninth Circuit candidly acknowledged the absence of any "statutorily conferred right of action in federal court" to cover the conduct alleged and recognized *Merrell Dow*'s rule that "[o]rdinarily ... federal

jurisdiction does not lie under 28 U.S.C. § 1331 where there is no right of action conferred by federal statute." 375 F.3d at 841 (citing *Merrell Dow*, 478 U.S. at 817). Nevertheless, the Ninth Circuit felt obliged to disregard *Merrell Dow* in favor of its own earlier decision in *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998), which had created an exclusive jurisdiction "exception" to *Merrell Dow*'s straightforward rule. 375 F.3d at 843 n.10.

Specifically, in the decision below, the Ninth Circuit considered the following provision of the Federal Power Act:

> The District Courts of the United States ... shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

16 U.S.C. § 825p. The Ninth Circuit found that "*Sparta* establishes ... that [§ 825p's] exclusive jurisdiction provision takes the case outside of the rule of *Merrell Dow*," which, it acknowledged, "otherwise might bar the action." 375 F.3d 841.

The problem, however, is that this Court had held just the opposite in *Pan American* when it considered an essentially identical exclusivity provision of the Natural Gas Act. In *Pan American*, this Court considered the effect of the following language:

> The District Courts of the United States ... shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty

> created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder.

Pan American, 366 U.S. at 662 (quoting 15 U.S.C. § 717r). In *Pan American*, as in the case below, the plaintiffs had brought suit alleging only causes of action under state law. *Id.* at 657. In *Pan American*, because the prices to be paid for natural gas were determined in accordance with rates filed with the Federal Power Commission, the defendants, like the Respondents here, argued that the Natural Gas Act's exclusive-jurisdiction provision deprived state courts of jurisdiction over the state-law contract claims. *Id.* at 662. Accordingly, the question presented in *Pan American*, like the question presented in this case, was whether language granting "exclusive jurisdiction" to the federal district courts "deprived state courts of jurisdiction" over cases alleging state law causes of action. *Id.*

In *Pan American*, this Court answered no and held that the Natural Gas Act's exclusivity language – language identical to the language found in the Federal Power Act examined by the Ninth Circuit here – was *not* a broad "generator of [federal] jurisdiction" that supplanted 28 U.S.C. § 1331. *Id.* at 664. Instead, this Court determined that the language simply dictated that federal courts be the exclusive venue for any causes of action created under the statute. *Id.* Thus, this Court held, when granting "exclusive jurisdiction" to federal courts, Congress had used the words with reference "only to suits that may be brought in the federal courts." *Id.* (citing *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255, 259 (1897)).

In this case, the Ninth Circuit misconstrued the Federal Power Act's exclusive-jurisdiction language, finding it to be a "generator of jurisdiction" despite this Court's clear holding to the contrary. Indeed, to its credit,

the Ninth Circuit openly admitted as much, when it candidly acknowledged the conflict with *Merrell Dow* and *Pan American* – but nonetheless noted that it "fe[lt] bound" by its own decision in *Sparta*. 375 F.3d at 843 n.10. Whether or not the Ninth Circuit was bound to privilege its own precedent over *Merrell Dow* and *Pan American*, this Court plainly is not. *Merrell Dow* and *Pan American* control this case, and this Court should so hold.

B. The State Courts Are Competent To Resolve Issues of Federal Law.

A state court does not lose jurisdiction simply because a case presents an issue of federal law. For more than a century, this Court has reiterated that the determination of issues arising under federal law "is not beyond the competency of the state tribunals." *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255, 259 (1897). Instead, state courts "are presumed competent to resolve federal issues," including preemption issues. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15-16 (1987), and *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511, 518 (1955)). Thus, "when a state proceeding presents a federal issue, ... the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo*, 486 U.S. at 149-50. Should the state court resolve the issue incorrectly, the aggrieved party has recourse through the state appellate process and may, of course, ultimately seek review by this Court. *See Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 290-91 (1922).

Congress has created a limited exception to permit the removal to federal court of cases in which the federal courts would have original jurisdiction. 28 U.S.C. § 1441. In this case, the Ninth Circuit permitted removal from state court without strictly adhering to the requirement of

original federal jurisdiction as explicated in cases like *Merrell Dow* and *Pan American*. By doing so, the Ninth Circuit has, in effect, nullified the presumption of state court competence, creating an exception that wrongly strips the jurisdiction of the state courts.

C. Principles of Federalism Dictate That State and Federal Courts Operate in Separate and Distinct Jurisdictional Spheres.

The division of powers between state and federal sovereigns is a cornerstone of the United States Constitution. James Madison described the principle of "double security" incorporated into the United States Constitution:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the right of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, pp. 350-51 (J. Cooke ed. 1961).

Under our Constitution, powers of government are balanced between the federal and state governments. The power of the federal government is limited to the specific grants of authority given to it by the people through their Constitution. Any powers of government not specifically granted to the federal government are reserved to the States. The States are free to govern themselves within the boundaries established by the lawful acts of the federal government and the constitutional principles applied to the States through the Fourteenth Amendment.

Fundamental constitutional principles demand proper respect for "the constitutional role of the States as

sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Unlike a simple hierarchy of power, such as that present within a single branch of government, the federal and state governments are "separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Ableman v. Booth*, 62 U.S. 506, 516 (1858). Consistent with the division of state and federal powers into separate and distinct spheres, principles of federalism ensure that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Thus, under our Constitution, the States are free to determine that unfair and fraudulent business practices threaten the health and safety of their residents, to pass laws prohibiting such practices, and to institute appropriate enforcement actions in state court.

Here, in the face of *Merrell Dow* and *Pan American*, the Ninth Circuit construed the Federal Power Act's exclusive-jurisdiction language to be a broad "generator of jurisdiction." The Ninth Circuit's broad interpretation results in (i) the displacement of a state law that was expressly designed to protect the health and safety of state residents and (ii) the obstruction of state-initiated law enforcement proceedings – all without proper acknowledgement of the presumption that Congress does not intend to displace State law.

Congress, this Court has said, does not "readily interfere" with the sovereign powers reserved to the States under the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). In determining the potentially preemptive effect of federal legislation, the Court presumes that Congress does not intend to upset the delicate balance of federal and state sovereign power, particularly where the state law concerns subjects traditionally within the police power, such as health and

safety laws. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Hillsborough County, Fla., v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Likewise, in interpreting the scope of federal law, this Court is careful to interpret statutes so as not to effect "substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002).

Before this Court will act to "alter the 'usual constitutional balance between the States and the Federal Government,' " it requires a clear statement from Congress. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). The point, of course, is not to burden the legislative process, but to ensure "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 544 (2002).

Congress has been careful to preserve and protect the boundary between state and federal jurisdiction. For example, the Anti-Injunction Act provides that –

> A court of the United States may not grant an injunction to stay proceedings in a State court, except [i] as expressly authorized by Act of Congress, or [ii] where necessary in aid of its jurisdiction, or [iii] to protect or effectuate its judgments.

28 U.S.C. § 2283. As this Court has noted, the Anti-Injunction Act "in part rests on the fundamental constitutional independence of the States and their courts"; accordingly, the Act's exceptions "should not be enlarged by loose statutory construction." *Atlantic Coast*

Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970). In this same vein, this Court has discouraged the federal courts' use of such injunctions when their legality is uncertain, emphasizing that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state court to proceed in an orderly fashion to finally determine the controversy" before it. *Id.* at 297.

Likewise, in creating a procedure for the removal of federal causes of action from state court to federal court, Congress did not manifest an intention to disturb the balance between state and federal jurisdiction. Rather, Congress exercised great care not to intrude into the realm of state sovereignty – twice. First, Congress expressly limited removal under 28 U.S.C. § 1441(a) to those cases over which the federal courts already had subject matter jurisdiction. Second, Congress expressly safeguarded state jurisdiction by mandating the remand to state court if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). Congress thus made clear that there is no such thing as independent federal removal jurisdiction; there is only original jurisdiction under 28 U.S.C. § 1331. *See Franchise Tax Bd. of the State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 8 (1983).

Determining whether a case is one "arising under the Constitution, laws, or treaties of the United States" within the meaning of § 1331 raises important "issues regarding the interrelation of federal and state authority." *Franchise Tax Board*, 463 U.S. at 8. When jurisdiction is uncertain, there is a "need for careful judgments about the exercise of federal judicial power." *Merrell Dow*, 478 U.S. at 814. In particular, this Court looks to the statutory scheme to see whether Congress has created a federal remedy, thereby generating federal

jurisdiction. *Id.* A "congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.*

By ignoring this Court's precedents – and the foundational principles underlying them – the Ninth Circuit plainly erred. This Court should grant certiorari and set matters straight.

D. The Well-Pleaded Complaint Rule Strikes a Logical Balance Between State and Federal Jurisdiction.

In determining whether a case is one "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, federal courts, of course, look to the "plaintiff's statement of his own claim," not the defendant's answer. *See Franchise Tax Bd.*, 463 U.S. at 10 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). This Court has repeatedly held that in order for a plaintiff's complaint to "arise under" federal law, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Id.* at 10-11 (citing *Gully v. First National Bank*, 299 U.S. 109, 112 (1936)).

A practical benefit of the well-pleaded complaint rule is that it minimizes the potential for state-federal conflicts. As this Court has observed, the rule "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10. When "both parties admit that the only question for

decision is raised by a federal preemption defense," the well-pleaded complaint rule protects a state court's jurisdiction of a suit "brought upon a state statute." *Id.* at 12 (citing *Gully*, 299 U.S. at 116.

The well-pleaded complaint rule "makes sense" in cases in which federal law "sets bounds for the operation of state authority." *Id.* at 11. The logic of this Court's well-pleaded complaint rule is easily demonstrated in the context of this case, in which the Respondents assert a defense of federal preemption of state-law causes of action: If a cause of action is *prohibited* by federal law, it cannot also *arise under* the same federal law. Rather, it must be said to arise under state law. Consistent with that logic, this Court has repeatedly held that "a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Pan American*, 366 U.S. at 664 (citing *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)).

The decision below ignores the insurmountable logic of the well-pleaded complaint rule and substitutes a rule that interferes with the exercise of state judicial, legislative, and executive authority. The writ should be granted and the decision of the Ninth Circuit should be reversed.

II. Whether the Removal Statute Effects an Unconstitutional Abrogation of State Sovereign Immunity Is a Question of First Impression and National Importance.

The States and the federal government are separate and distinct sovereigns under the Constitution, each with its own jurisdictional sphere. As this Court has recently observed,

> For over a century now, we have made clear that the Constitution does not provide for federal

> jurisdiction over suits against nonconsenting States. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-670 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 726 (2003). There are only two instances where the sovereign States may find themselves litigating claims in federal court. First, of course, States may, through their actions, voluntarily submit to the jurisdiction of the federal courts. *See, e.g., Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."). Second, Congress may in certain narrowly-circumscribed instances abrogate the States' immunity and subject the States to suit in federal court. *See, e.g., Hibbs*, 538 U.S. at 737. When Congress does so, however, it must first speak with an "unmistakably clear" voice. *Will v. Michigan Department of State Police*, 491 U.S. at 65.

In this case, neither exception to state sovereign immunity obtains. Nevertheless, the State of California, having acted carefully to plead only state-law claims in state court, has now been essentially dragged into federal court over its objection and forced to litigate its state-law claims there. By subjecting the State of California to federal jurisdiction over its objection and without any clear Congressional mandate, the Ninth Circuit has expanded the reach of the federal courts far beyond the constitutional boundary carefully enunciated by this Court.

As the petition itself makes clear (Pet. at 21), the Eighth, Ninth, and Tenth Circuits are now divided on the issue of whether state sovereignty bars removal against unconsenting States. The issue is one that requires national uniformity, and one that implicates important federalism concerns. This Court should grant the writ and resolve the uncertainty that now faces the several States, which must decide whether to bring claims in state court, not knowing whether those claims may be removed over their objections to federal court.

A. The Court Looks Beyond Litigation Formalities To Determine Whether State Sovereignty Prohibits a Suit.

"The preeminent purpose of state sovereign immunity [under the United States Constitution] is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002). The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The sovereign immunity that the States enjoy "neither derives from nor is limited by" the text of the Eleventh Amendment, however. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

Because the principle of sovereign immunity "transcends the narrow text of the Amendment itself," *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 688 n.5 (1999), this Court has not limited itself to a textual analysis of the Amendment in order to discern the "usual constitutional balance," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), between state and federal jurisdictional authority.

On the contrary, the Eleventh Amendment stands "not so much for what it says, but for the presupposition ... which it confirms." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779 (1991). Accordingly, since the adoption of the Eleventh Amendment, the Court has given it a generous construction and has expanded both the types of entities entitled to immunity and the types of suits from which those entities are immune, so as to "accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. at 760. *See, e.g., Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (holding that unconsenting states sued by their own citizens are entitled to sovereign immunity); *Edelman v. Jordan*, 415 U.S. 651, 663-667 (1974) (holding that the Eleventh Amendment prohibits suits demanding monetary damages from the state treasury); *Louisiana v. Jumel*, 107 U.S. 711, 720 (1883) (holding that the Eleventh Amendment prohibits suits seeking to enjoin State action).

Furthermore, in determining the scope of state sovereign immunity, the Court has looked beyond the style of the case to determine whether the litigation actually interferes with the role of the State as sovereign. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) ("[T]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."); *Ex parte New York*, 256 U.S. 490, 500 (1921) (what constitutes "a suit against the State" under the Eleventh Amendment "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record"). Thus, the Court has interpreted the Eleventh Amendment to apply not

only to States, but also to "arms of the state" such as state agencies. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The Court has also interpreted the Eleventh Amendment to protect States from litigation in their own courts. *Alden v. Maine*, 527 U.S. 706, 713 (1999). Finally, and perhaps most significantly for present purposes, the Court has also interpreted the Eleventh Amendment to prohibit injunctions, including those issued by a federal court against a State acting as a plaintiff in a state court proceeding. *See Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

In *Fiske*, this Court refused to permit a federal court to issue an injunction against a State acting as a plaintiff in a state court proceeding. *Id.* at 27. In so doing, this Court noted that the Eleventh Amendment "is an explicit limitation of the judicial power of the United States" which prohibits intrusion by federal courts into the "forbidden sphere" of state sovereignty. *Id.* at 25. This Court held that a federal court "has no authority to issue process against the state to compel it to subject itself to the court's judgment, whatever the nature of the suit." *Id.* at 28.

In interpreting the boundary of State sovereignty reflected in the Eleventh Amendment, this Court has looked beyond the formality of the actual parties named in the suit and the specific relief sought to discern the cumulative effect of the suit on the State as sovereign. Thus, this Court has considered a suit to be prohibited by the Eleventh Amendment "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984) (internal citations and quotations omitted).

The adverse effect of forcing the States to litigate state-law claims in federal court is substantial. After removal, a federal district court is empowered to "issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise." 28 U.S.C. § 1447(a). Thus, the federal district court may issue orders against the State-plaintiff that would affect the State treasury, *Edelman v. Jordan*, 415 U.S. 651, 663-667 (1974), such as orders for sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure. The district court may also use its powers of contempt. In the event the State does not prevail, the district court may assess court costs, including attorneys' fees in appropriate cases. If indeed a federal court "has no authority to issue process against the state to compel it to subject itself to the court's judgment, whatever the nature of the suit," *Fiske*, 290 U.S. at 28, then the exercise of federal removal jurisdiction against unconsenting States violates the States' sovereign immunity.

"The very object and purpose of the 11th Amendment [are] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The object and purpose of state sovereign immunity are frustrated by requiring States to litigate state-law claims in federal courts without their consent.

A State may, of course, voluntarily consent to federal court jurisdiction. In order to do so, however, a state must either purposefully invoke a federal court's jurisdiction, *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), or makes a "clear declaration" that it intends to submit itself to a federal court's jurisdiction, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54, 64

(1944). A "clear declaration" must be "express" and "unequivocal" and may not be constructive. *College Sav. Bank*, 527 U.S. at 680 (overruling *Parden v. Terminal Ry. of Alabama Docks Dept.*, 377 U.S. 184 (1964)). The requirement of a "clear declaration" of waiver before a State is deemed to have submitted to the jurisdiction of the federal courts is consistent with this Court's stated intent to "accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. at 760.

In this case, California did nothing to invoke the jurisdiction of the federal court.[1] On the contrary, California did everything it could to stay out of federal court, filing its state-law claims in state court and taking care to observe the well-pleaded complaint rule articulated by this Court. Nevertheless, it now finds itself having been dragged into federal court over its objection.

B. Subjecting States to Federal Jurisdiction Without Their Consent Raises Serious Constitutional Questions and Requires, At the Very Least, a Clear Statement From Congress.

"When Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Atascadero*, 473 U.S. at 246. Before Congress can abrogate the States' immunity and subject unconsenting States to federal court jurisdiction, "it must make its

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[1] This case is thus distinguishable from those cases in which States have, through their own actions, submitted themselves to the jurisdiction of the federal courts. *See, e.g., Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613 (2002) (finding state waived its Eleventh Amendment immunity by *voluntarily* invoking the jurisdiction of the federal court by filing *its own* removal petition).

intention to abrogate unmistakably clear in the language of the statute." *Raygor*, 534 U.S. at 541 (internal quotations and citations omitted). The clear statement principle "applies when Congress intends to preempt the historic powers of the States or when it legislates in traditionally sensitive areas that affect the federal balance." *Id.* At 543 (internal quotation marks and citations omitted). "In such cases, the clear statement principle reflects 'an acknowledgement that the States retain substantial sovereign powers under out constitutional scheme, powers with which Congress does not readily interfere.'" *Id.* at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)).

In *Raygor*, this Court considered whether the supplemental jurisdiction statute applied to state-law claims against unconsenting States. Although "nothing in the statute expressly exclude[d] such claims," this Court nevertheless deemed them excluded. When Congress is silent on important issues of state sovereignty, this Court said, the Court "h[as] good reason to rely on a clear statement principle of statutory construction." *Raygor*, 534 U.S. at 543. Relying on its reasoning in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991), the Court held that a general grant of jurisdiction "does not extend to claims against nonconsenting state defendants." *Raygor*, 534 U.S. at 541-42.

The same reasoning applies in this case. This Court should take the next step in its historical analysis of state sovereignty by holding that, in the absence of a clear statement of Congress to the contrary, a state's constitutionally-based and sovereign interest in litigating its own cases in its own courts must take precedence over general removal statutes. In so doing, this Court will avoid "alter[ing] the 'usual constitutional balance between the States and the Federal Government.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)

(quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

In this case, Congress did not speak with a clear voice indicating its intention to subject the State of California to federal jurisdiction. Nevertheless, the Ninth Circuit reached out beyond its boundary and took jurisdiction over a civil enforcement action brought by the State of California to protect its own residents. Principles of federalism require, at the very least, that federal courts refrain from exercising jurisdiction over civil law enforcement proceedings brought by the States to police conduct within their borders, absent a clear statement from Congress that over-arching constitutional demands justify such interference.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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